Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

PORTLAND 76 AUTO/TRUCK PLAZA, INC.,

Petitioner,

v.

UNION OIL COMPANY OF CALIFORNIA, dba UNOCAL,
NATIONAL AUTO/TRUCKSTOPS, INC.

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 30, 1998

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QUESTIONS PRESENTED

Section 2(e) of the Robinson-Patman Act prohibits a wholesaler from discriminating in favor of one reseller over another in the furnishing of "services or facilities connected with the processing, handling, sale or offering for sale of [a] commodity." A jury found in favor of petitioner, a diesel fuel reseller, on petitioner's claim that respondent had discriminated against petitioner by failing to provide petitioner with facilities on proportionally equal terms to those facilities afforded to similarly situated resellers. The questions presented are:

1. Whether, under the plain meaning of section 2(e) of the Robinson-Patman Act, facilities that are provided to promote the resale of a commodity are "facilities" as that word is used in section 2(e) of the Robinson-Patman Act if those facilities are located on leased property?

2. Whether a judicially created exception to section 2(e) of the Robinson-Patman Act exists for franchisors and other wholesalers of commodities otherwise subject to the Robinson-Patman Act, simply because the franchisor's or wholesaler's commodities are sold on property leased by the franchisee-reseller?

LIST OF PARTIES AND AFFILIATES

The parties listed on the caption were the only parties to the proceedings before the Ninth Circuit Court of Appeals. At trial, Portland 76 Auto/Truck Plaza, Inc. ("Portland 76") and defendant National Auto Truckstops, Inc. ("National") stipulated to a judgment dismissing Portland 76's breach of lease claim against National. National is not a subject of the present petition.

Pursuant to Supreme Court Rule 29.1, Portland 76 declares that it has no parent or subsidiaries.

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PORTLAND 76 AUTO/TRUCK PLAZA, INC.,

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UNION OIL COMPANY OF CALIFORNIA, dba UNOCAL, NATIONAL AUTO/TRUCKSTOP, INC.,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Portland 76 Auto/Truck Plaza, Inc. respectfully prays that a writ of certiorari issue to review the opinion of the Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-23) is reported at 153 F.3d 938 (CA 9 1998). The decisions of the lower court from which the appeal is taken (App. 26-32, App. 43-44) are unreported.

JURISDICTION

A timely petition for rehearing and suggestion of rehearing en banc was denied on October 7, 1998 (App. 24-25). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved in this case is 15 U.S.C. § 13(e), which is reproduced at App. 53-54.

STATEMENT OF THE CASE

Petitioner, Portland 76 Auto/Truckstop Plaza, Inc. ("Portland 76"), had an agreement with respondent, Union Oil Company of California ("Unocal"), to purchase diesel fuel from Unocal for resale. Portland 76 eventually pursued litigation against Unocal, alleging, in part, that Unocal had violated section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e). The jury awarded $2,307,440 to Portland 76 on its Robinson-Patman Act claim. App. 34, 42. Pursuant to 15 U.S.C. § 15, that amount was trebled, to a total of $6,922,320. App. 34.

Unocal appealed the judgment on Portland 76's Robinson-Patman Act claim. The Ninth Circuit Court of Appeals, in an opinion by Circuit Judge Kleinfeld, concluded that the Robinson-Patman Act's ban on the discriminatory provision of "facilities" did not apply to "facilities" provided on leased property, and, therefore, reversed the trial court's judgment on the Robinson-Patman Act claim. App. 17. Portland 76 has filed this petition for a writ of certiorari in order to seek review of that holding.

A. Facilities In The Unocal Franchise Truckstop System

For many years, Unocal operated a franchised chain of full-service "76" truckstops across the country. Unocal full-service truckstops were designed to promote the resale of fuel to long-haul truckers. Truckers consider a full-service truckstop to be a home away from home. Facilities at a full-service truckstop -- *e.g.* restaurants, lounges, game rooms, phones, showers, laundry machines -- are intended to encourage truckers to stop and purchase fuel at that truckstop. Truckstops actively promote the sale of diesel fuel. There is a direct correlation between the quality of facilities at a Unocal truckstop and that truckstop's

fuel sales. In fact, truckstop facilities are even more important than fuel price in getting long-haul truckers to purchase fuel.

B. Portland 76's Agreements with Unocal

In 1978, Portland 76 entered into two interrelated agreements with Unocal. Under the first agreement, Unocal agreed to sell fuel to Portland 76 for resale at a truckstop. The second agreement was a lease for a Unocal brand truckstop in Aurora, Oregon. That lease specifically provided that its purpose was to allow the sale of Unocal fuel.

C. Problems with the Truckstop's Facilities

During the late 1980s, truckstop facilities across the country underwent vast improvements to promote fuel sales. During that same time, Unocal allowed Portland 76's facilities to fall far below industry standards. In 1986, after seven years of consistently profitable operations, Portland 76 began to notice that Unocal was not adequately maintaining or improving the truckstop's facilities. The problems with the facilities were numerous and had a direct impact on the promotion of fuel sales. Problems included: the lead-in sign from the highway to attract customers needed replacing; the signage on the highway was inadequate; the roof in the restaurant leaked and needed to be replaced; the heating and air-conditioning at the restaurant did not operate properly; the shower facilities lacked adequate ventilation; the parking-lot had potholes that truckers said they could "lose their trucks in" and into which truckers frequently fell; the sewage system produced a foul odor on hot days and had been cited by state authorities but was never repaired; fuel lanes were too narrow; the building needed painting; the travel store and phone room were cramped.

Portland 76's customers complained about the quality of the truckstop's facilities. Truckers began to refuse to stop at the

Portland 76 truckstop, because its facilities were viewed as dismal, run-down, lacking in key amenities, and inadequate in comparison to the facilities at other truckstops. Long-standing customers of Portland 76 stopped frequenting the truckstop. Fuel sales dropped.

D. The Discrimination in Facilities

Because big trucks have a fuel range of 1,600 to 1,800 miles, Portland 76 was competing with Unocal truck stops in Northern California. While Portland 76 struggled with its poor facilities, Unocal renovated and improved the facilities of those other Unocal truckstops. Unocal was not required under its leases with the Northern California Unocal brand truckstop operators to make facilities improvements. However, those truckstops received a variety of critical facilities designed to promote sales, such as new restaurants, travel stores, lounges, improved showers and other driver amenities. Because of the importance of such facilities to the resale of fuel, Portland 76 customers began stopping for extended fueling stops at the other Unocal truckstops -- as well as truckstops of Unocal's competitors -- in the relevant market area.

Even though the Portland 76 location had as much truck traffic as the Northern California Unocal truckstops, Unocal spent a substantially disproportionate amount of money improving the Northern California truckstops in comparison to the Portland 76 truckstop. For example, between 1987 and 1990, Unocal spent between four and six times as much money on improvements to the facilities at three Northern California truckstops than it did on the facilities at the Portland 76 truckstop. That disparity in spending led to a disparity in quality at the different Unocal truckstops. Even Unocal recognized that the Portland 76 truckstop had become "far inferior" when compared to other truckstops in the relevant market area.

Unocal's gross spending disparities damaged Portland 76 and caused Portland 76 to lose business to other competing truckstops. The jury found that Portland 76 lost over $2.3 million in business income as a result of Unocal's discrimination. App. 42. If Portland 76 had received similar facilities, its losses would have ceased and its profits would have increased dramatically.

E. The Proceedings Below

In 1992, Portland 76 brought suit against Unocal. Portland 76 alleged, in part, that Unocal had violated section 2(e) of the Robinson-Patman Act by failing to provide Portland 76 with "facilities" on "proportionally equal terms" to those facilities that had been provided to Portland 76's competitors. Relying on the plain meaning of the term "facilities," the district court denied Unocal's motions in which Unocal argued that the truckstop's facilities could not be "facilities" covered by section 2(e). App. 27, 44. The jury concluded that Unocal had violated section 2(e), and rendered a verdict accordingly. App. 41-42.

Unocal appealed the trial court's entry of the jury verdict against Unocal on the Robinson-Patman Act claim. The Ninth Circuit, by Judge Kleinfeld, reversed, holding that the truckstop facilities were not "facilities" under the Robinson-Patman Act. The Ninth Circuit recognized that the record was replete with evidence that independent facilities at the truckstop -- such as the highway signs, the roof and heating system at the restaurant, the showers, the laundry facilities, and the sewage system -- all were in disrepair. *Id.* at 4. The Ninth Circuit also recognized that those facilities were built and used primarily to promote the resale of fuel. *Id.* at 2. In fact, the Ninth Circuit explicitly recognized that Portland 76 had proven all the necessary elements of its Robinson-Patman Act claim. *Id.* at 6-7.

Nonetheless, the Ninth Circuit concluded that the truckstop itself was not a "facility" within the reach of section 2(e) of the Robinson-Patman Act, because Portland 76 leased that truckstop from Unocal. Accordingly, the Ninth Circuit believed that "facilities" at the truckstop were not "facilities" under the Robinson-Patman Act. *Id.* at 17.

The Ninth Circuit's holding contradicts the plain meaning of the Robinson-Patman Act, creates a judicially made exception to the statute, and has no basis in this Court's jurisprudence or the legislative history of the statute. The Ninth Circuit's decision, if allowed to stand, will have a broad economic impact on franchising, which has become one of the country's most popular ways of conducting business. Under the Ninth Circuit's decision, franchisors will be able to evade the Robinson-Patman Act simply by linking the provision of facilities to a lease agreement. This Court should grant this petition for a writ of certiorari in order to review the Ninth Circuit's flawed opinion.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S OPINION IGNORES THE PLAIN MEANING OF THE WORD "FACILITIES" AS THAT WORD IS USED IN THE ROBINSON-PATMAN ACT.

The Ninth Circuit concluded that the facilities at the truckstop were not "facilities" within the reach of section 2(e) of the Act, because those facilities were located on leased property. In reaching that conclusion, the Ninth Circuit ignored the plain meaning of the word "facilities."

The Robinson-Patman Act (the "Act") generally makes it unlawful for a wholesaler of a commodity to discriminate in the prices offered to different purchasers of that commodity. 15

U.S.C. § 13(a). App. 51-52. Several provisions of the Act specifically prohibit wholesalers from offering disguised discounts to purchasers of commodities. 15 U.S.C. §§ 13(c)-(e). App. 52-54. Section 2(e) prohibits disguised price discrimination though the unequal provision of "facilities" by a wholesaler to different resellers of a commodity. Section 2(e) provides:

> "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

15 U.S.C. § 13(e). App. 53.

Because the word "facilities" is not defined in the Act, the Ninth Circuit should have applied the plain meaning doctrine to interpret it. This Court repeatedly has stated that, in interpreting a statute, a court must first look to the language of the statute. *Pavelic & LeFlore v. Marvel Entertainment*, 493 U.S. 120, 123 (1989). If the language of the statute is unambiguous, a court's inquiry should proceed no further. *Id.* at 123. *See also Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal cannon before all others. . . . When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 538 (1994) (Thomas, J., concurring) ("When

the text of a statute is clear, our interpretive inquiry ends."). That rule applies even when the language of the statute leads to a result that may appear undesirable to a reviewing court. *Pavelic & LeFlore*, 493 U.S. at 126 ("Our task is to apply the text, not to improve upon it"); *Connecticut Nat. Bank*, 503 U.S. at 253-54 ("[w]e have stated time and again that a court must presume that a legislature says in a statute what it means and means in a statute what it says there").

The Ninth Circuit acknowledged that the text of the Act would lead to the conclusion that the facilities at the truckstop are "facilities" under section 2(e). App. 6. However, the Ninth Circuit disregarded the clear language of the statute and instead concluded that "facilities" on leased property were not "facilities" under the statute. In reaching that conclusion, the Ninth Circuit relied on: (1) interpretations from two other circuits (the validity of which the Ninth Circuit questioned in its opinion); (2) inapposite legislative history; and (3) a truncated reading of Federal Trade Commission ("FTC") regulations. The Ninth Circuit's analysis disregards this Court's clear instructions as to how a court should interpret a statute. The Ninth Circuit's holding -- when read in conjunction with recent opinions from the Fourth and Sixth Circuits -- serves to solidify a flawed application of the Act. A uniform rule is emerging from the Circuit Courts of Appeal that precludes any party to a lease from pursuing a claim for discrimination by a wholesaler in the provision of facilities to promote the resale of a commodity, in contravention of the clear language of the Act.

A. The Plain Meaning of the Statute Contains No Exception for "Facilities" on Leased Property.

The Ninth Circuit disregarded the plain meaning of section 2(e) of the Act when it created a "leased property" exception to section 2(e). Nothing in the text of the Act supports

the judicial creation of the Ninth Circuit's leased property exception.

Reading the word "facilities" in section 2(e) to include the facilities at the truckstop comports with the plain meaning of the word "facilities." For example, the dictionary defines a facility as "something that promotes the ease of any action, operation, transaction, or course of conduct" or "something (as a hospital, machinery, plumbing) that is built, constructed, installed or established to perform some particular function or to serve or facilitate some particular end." *Webster's Third New International Dictionary* at 812-13 (unabridged edition 1993). That definition has not changed substantively since the time Congress enacted the Act. *See Webster's New International Dictionary* at 908 (second edition 1943) (defining a facility as "[a] thing that promotes the ease of any action, operation, transaction, or course of conduct; advantage; opportunity; -- usually in pl.; as, special facilities for study").[1] Under either of those definitions, facilities on leased realty would be facilities within the reach of section 2(e) of the Act. Similarly, under either of those definitions, the truckstop itself would be a "facility." Even the Ninth Circuit acknowledged this. App. 8. The plain meaning of the statute is clear and unambiguous.

Even though the plain language of section 2(e) of the Act speaks to discrimination in the provision of "facilities," the Ninth Circuit concluded that the truckstop itself, as a whole entity, was not a "facility" under section 2(e) of the Act. Therefore, the court reasoned, the facilities at the truckstop also were not "facilities" as that term is used in section 2(e). The Ninth Circuit engaged in linguistic gymnastics in order to

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[1] *See Pennsylvania Department of Corrections v. Yeskey*, ___ U.S. ___, ____, 118 S. Ct. 1952, 1955 (1998) (citing Webster's New International Dictionary to establish the plain meaning of a word used in a statute).

convert the *facilities* at the truckstop into the truckstop itself. All the participants in this case -- the judge, jury, litigants and Ninth Circuit -- understood the word "facilities" to refer to those facilities at the truckstop that served to promote the resale of Unocal fuel. Throughout the course of the trial, all the parties referred to the various amenities at the Aurora truckstop designed to promote the resale of fuel as "facilities." Even Unocal's internal documents called the amenities at the truckstop "facilities." The jury was instructed repeatedly to consider whether Unocal had discriminated in the furnishing of "facilities" at the Aurora truckstop. App. 45-50. Similarly, even the Ninth Circuit described those amenities as "facilities". *See* App. 3 (discussing Unocal's proposal to redesign the "shower and laundry facilities"). The Ninth Circuit's conversion of the "facilities" at the truckstop to a singular "facility" contravenes the case litigated by the parties, decided by the jury and considered by the Ninth Circuit.

The language in section 2(e) surrounding the word "facilities" similarly shows that "facilities" are vehicles that promote the sale of a commodity. *See Pavelic & LaFlore*, 493 U.S. at 123-126 (using the language surrounding an undefined term in a statute to aid in interpreting the meaning of the undefined term). "Facilities" are things that are "connected with the processing, handling, sale or offering for sale of [a] commodity" purchased from a wholesaler. 15 U.S.C. § 13(e). Facilities at a truckstop created, designed and maintained to promote the resale of fuel clearly are connected with the "sale or offering for sale of [a] commodity." Accordingly, those facilities are "facilities" as that word is used in the statute.

The Act's use of the word "purchaser" also belies the existence of the Ninth Circuit's judicially created leased property exception. Section 2(e) applies to "purchasers" of "commodities." While "purchaser" is not defined in the Act,

there is nothing in the language of the Act that limits "purchasers" to only those resellers who own the land on which they resell the commodity. As long as the "purchaser" buys the commodity from the wholesaler, the "purchaser" is protected under the Act. However, the Ninth Circuit's opinion eviscerates the class of "purchasers" who can claim protection under the Act. Under the Ninth Circuit's opinion, only those purchasers who do not lease from the wholesaler the land on which they resell the commodity are protected.

There is nothing within the language of the Robinson-Patman Act that lends support to the Ninth Circuit's holding that facilities on *leased* property somehow are excluded from the ambit of section 2(e) of the Act. The statute does not contain a "leasehold" exception. The statute gives a wholesaler no greater freedom to act because of the nature of the reseller's legal interest in the real property on which a commodity is being resold. The Act is an anti-trust statute, not a real property statute. It does not incorporate, explicitly, by reference, or even implicitly, common-law real property rules. Yet, in order to avoid the plain meaning of "facilities," the Ninth Circuit relied precisely on such rules. App. 7-8 (discussing common law treatment of leases during the time period that the Act was enacted by Congress).

B. Action by the Supreme Court Is Required to Eliminate a Non-Textual Leased Property Exception to Section 2(e) of the Robinson-Patman Act That Has Been Adopted by the Fourth, Sixth and Ninth Circuits.

The Ninth Circuit noted that two other circuits have held that "leased realty" could not constitute a "facility" as that word is used in section 2(e). The Ninth Circuit questioned the reasoning behind those two opinions, *Export Liquor Sales, Inc.*

v. Ammex Warehouse Company, 426 F.2d 251, 252 (CA 6 1970), *cert. denied*, 400 U.S. 1000 (1971) and *Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 380 (CA 4), *cert. denied*, 506 U.S. 1041 (1992). App. 9-10. The Ninth Circuit properly recognized that in *Export Liquors*, the Sixth Circuit did not explain its reason for concluding that section 2(e) of the Act contained a leased property exclusion. App. 10 ("[t]he Sixth Circuit decision does not say why leased realty is not 'facilities connected with the . . . sale . . . of such commodity,' in the sense intended by [section 2(e)]"). The Ninth Circuit also properly criticized the Fourth Circuit's analysis in *Hinkleman*. *Id.* ("[w]e are not sure of the tenability of the *Hinkleman* distinction").

In *Hinkleman*, a divided Fourth Circuit panel held that the leased premises at a gasoline station "facilitated" but did not "promote" the resale of fuel and, accordingly, were not facilities under section 2(e). 962 F.2d at 380-81.[2] The dissent in *Hinkleman* criticized the majority's conclusion that a gas station could not be considered a "facility." *Id.* at 381-84. The dissent noted that the principal purpose of the Act was to attack discrimination in advertising and promotional activities, and criticized the majority's decision to ignore this Court's instructions that courts "are not in a position to review the economic wisdom of Congress." *Id.* at 372, *quoting F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959). The dissent in *Hinkleman* recognized that the majority's narrow reading of section 2(e) "contravene[d]" the plain meaning of the Act, the legislative history of the Act, and the purpose of the Act. *Id.* at 383. The dissent observed that:

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[2] In *Hinkleman*, the Fourth Circuit analyzed the Maryland state law analog to section 2(e) of the Act. However, both the majority and the dissent recognized that that analysis hinged on the interpretation and application of the word "facilities" as that word is used in section 2(e) of the Act.

> "Under the rationale of the majority, if Shell furnishes on unequal terms signs to be affixed to the front of its gasoline purchasers' service stations, § 2(e) is violated. But, if it furnishes the entire service station on unequal terms, § 2(e) is not violated. The violation is more egregious, rather than non-existent, in the latter instance."

Id. (Footnote omitted.) Similarly, the trial judge in this case, who had heard extensive evidence that truckstop facilities directly promote fuel sales, found that the majority decision in *Hinkleman* was confusing; even Unocal's counsel conceded that the majority's logic was "tortured."[3]

Despite its criticism of the Fourth and Sixth Circuits' opinions, the Ninth Circuit relied on the fact that those "two circuits have ruled that leased real estate cannot be 'facilities' and none have ruled that it can be." App. 10. The Ninth Circuit decided to follow those opinions and avoid an intercircuit conflict "[b]ecause of the importance of predictability to commercial relations, as well as deference to our sister circuits." *Id.*

The Ninth Circuit's approach in addressing the Fourth and Sixth Circuit opinions is flawed. The approach avoids a reasoned consideration of the issue presented in this case. The Ninth Circuit decided to follow two opinions that it explicitly recognized as being devoid of compelling reasoning in order to *avoid* a conflict between the circuits; that abdication of responsibility is both unhelpful to litigants and patently unjust.

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[3] In this case, the evidence showed that truckstop facilities are intended to promote, and do promote, fuel sales. App. 2, 4. In *Hinkleman*, which was decided on a pre-trial motion to dismiss, that court lacked a fully developed record.

Three circuits have created an exception to the plain meaning of the text of section 2(e) of the Act. In all three cases, the legal reasoning supporting the creation of that exception is flawed. As with other judicially disfavored statutes, the circuits appear to be struggling to find a way to restrict the scope of the Act by adding exceptions to the Act that are not supported by the text of the Act.

C. The Legislative History of the Robinson-Patman Act Does Not Obfuscate the Plain Meaning of the Statute.

The Ninth Circuit also relied on inapposite legislative history to support its creation of a leased property exception to section 2(e) of the Act. The Ninth Circuit's non-persuasive reliance on that irrelevant legislative history was improper.

After the Ninth Circuit concluded that the text of the Robinson-Patman Act was ambiguous, the court turned to the legislative history of the Act to determine whether Congress intended to exclude facilities on leased property from the "facilities" covered by section 2(e). The Ninth Circuit recognized that the legislative history did not address that issue. App. 10-13. The Ninth Circuit nonetheless concluded that, because Congress did not address the issue presented by this case, the legislative history indicated a legislative intent not to treat facilities on leased premises as "facilities" covered by the Act. *See* App. 13. ("Discrimination against a franchisee as tenant by a franchisor is different from use by chain stores of their market power to force wholesalers to discriminate against small local stores.")

The problem with that approach is twofold. First, the Ninth Circuit's application of legislative history provides little, if any, useful guidance in determining whether Congress desired to *exclude* facilities on leased property from the term "facilities" in

section 2(e). The fact that Congress did not mention the nature of the property interest on which the facilities lay indicates only that Congress did not debate that topic. Silence on a topic does not indicate ambiguity, especially in the light of the clear language of the statute.

The second flaw with the Ninth Circuit's use of legislative history in this case is that the Ninth Circuit altogether fails to make even the tiniest analogy available to it from the legislative history it quotes. The Ninth Circuit read the legislative history to provide that the *only* purpose of the Act is to prevent wholesalers of products from favoring chain stores over independent stores. App. 13. It is no large stretch to conclude that the situation presented here is the modern analog to the 1930s chain store/wholesaler scenario. In this era, a franchisor/distributor frequently is the wholesaler that has the power to favor one franchisee over another. The potential harm is the same; only the players have changed slightly.

The Ninth Circuit has chosen to let the legislative history freeze the statute in the economy of the 1930s. That approach undercuts the purpose and meaning of the Act. It also illustrates the shortcomings of relying on legislative history, especially in the light of the text of the statute. *See Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("[N]ot the least of the defects of legislative history is its indeterminacy. If one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history.") (Emphasis in original).

D. The Regulations Promulgated by the FTC Do Not Obfuscate the Plain Meaning of the Statute.

After looking at the text of the statute, and the legislative history, the Ninth Circuit turned to regulations promulgated by

the FTC to aid that court's determination as to whether facilities on leased property constitute "facilities" as that word is used in section 2(e) of the Act. App. 13-15. The Ninth Circuit misread and misapplied those regulations.

The Ninth Circuit acknowledged that the FTC has promulgated a *non-exhaustive* list of examples of "services and facilities" as that word is used in section 2(e) of the Act. That list includes "advertising", "handbills", "cabinets", "displays" and similar manifestations of materials created or installed to promote the sale of a commodity. The panel then concluded that, because "leased realty" was not "like the things on the list", the facilities at the truckstop were not "facilities" within the reach of section 2(e). App. 15. The Ninth Circuit did not cite to any ruling from the FTC that applied the leased property exclusion; the FTC never has stated that such an exclusion exists.

The Ninth Circuit's cursory assessment of the FTC rulings ignores the common factor that binds all of the items on the list -- that all of those items serve to promote the resale of a commodity. Highway signs, restaurants, fuel lanes, showers and laundry at a truckstop are how truckstops conduct promotion, just as display cabinets in a department stores promote the sale of the goods being displayed. *See Simplicity Pattern*, 360 U.S. at 59-61 (wholesaler's provision of display cabinets to department stores but not to other resellers constitutes discriminatory provision of "facilities" in violation of section 2(e)). Without those truckstop facilities, the resale of fuel would be hindered.

Moreover, the Ninth Circuit's analysis fails on its own terms. Under that analysis, if items specifically included in the FTC regulations -- "advertising", "handbills", "cabinets" and "displays" -- are located on leased property, even those items would not constitute facilities within the reach of section 2(e).

In other words, if the Ninth Circuit's analysis is taken to its logical end, the Ninth Circuit would exclude as "facilities" items that the FTC explicitly has identified as facilities.

E. The Ninth Circuit's Opinion Allows a Franchisor to Evade the Language and Purpose of the Robinson-Patman Act.

The Ninth Circuit's opinion effectively gives any franchisor a means to avoid the language and purpose of the Act. Under the Ninth Circuit's opinion, any franchisor that leases property to a franchisee can avoid the Act.

This Court has stated that the purpose of the Act is to prevent price discrimination by wholesalers. *Falls City Industries v. Vanco Beverage,* 460 U.S. 428, 436 (1983). The specific purpose of sections 2(d) and 2(e) is to prevent disguised price discrimination in the form of disproportionate payments or provision of facilities by wholesalers to promote the sale of the wholesaler's commodities. *See F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341, 352 (1968) ("Congress chose to deter such indirect price discrimination by prohibiting the granting of sales promotional allowances to one customer unless accorded on proportionally equal terms to all competing customers"); *see also Simplicity Pattern,* 360 U.S. at 69-71 (discussing purpose of section 2(e)).

The application of the "leased property" exception in this case ignores the purpose of the Act. Unocal did not lease the real estate to Portland 76 because of the revenue that the lease would generate on its own. Unocal did not make improvements at the Northern California Unocal brand truckstops for investment reasons related to rental income; nor were those changes made pursuant to the leases Unocal had with those truckstop operators. Unocal did not make those improvements to obtain greater lease payments or to obtain

higher sales prices in the event the leased properties were sold. In fact, the rents that Unocal charged to Portland 76 and the Northern California truckstops did not bear a proportional relationship to the facilities Unocal provided to those truckstops. Instead, the real estate lease was a means of establishing a location through which Portland 76 could resell diesel fuel. In other words, the lease agreement existed so that fuel would be resold by Portland 76. Unocal did not just breach that lease; Unocal also discriminated against Portland 76 by not providing it with facilities -- *in addition to those required by the lease* -- that Unocal provided its other franchisees in addition to those required under their leases.

The Ninth Circuit's opinion in this case illustrates how easy it will become for a clever franchisor to evade the plain meaning and the stated purpose of the Act. If the Ninth Circuit's opinion is allowed to stand, section 2(e) may well become inapplicable to franchisor/franchisee relations. Clearly, that is not what Congress intended when it enacted the Robinson-Patman Act.

II. The Ninth Circuit's Analysis is in Conflict with This Court's Analysis -- and the Analyses Undertaken by Other Circuit Courts of Appeals -- In Interpreting and Applying the Undefined Terms Contained in the Robinson-Patman Act.

A. The Ninth Circuit's Opinion Creates A Conflict in Principle with its Own and the Second Circuit's Application of the Word "Facilities" as that Word is Used in Section 2(e) of the Act.

This Court should act to rectify a confusing and inconsistent body of law that has developed under section 2(e). The Ninth Circuit's opinion in this case is inconsistent with an earlier opinion from the Ninth Circuit interpreting and applying

section 2(e) of the Act, *Standard Oil Company of California v. Perkins*, 396 F.2d 809 (CA 9 1968), *reversed on other grounds*, 395 U.S. 642 (1969). In *Perkins*, the plaintiff, Perkins, brought, as pertinent, a Robinson-Patman Act claim against Standard Oil Company. At trial, Perkins was permitted to pursue his section 2(e) claim, based on the theory that the defendant failed to make "the same proportional payments and allowances to Perkins for such items as service station rest room maintenance, painting of service stations, advertising and credit card privileges" as the defendant did to other dealers. 396 F.2d at 814. Some of the gas stations at issue in that case were "leased premises" as that term is used by the Ninth Circuit in its opinion in this case. Simply put, in *Perkins*, the Ninth Circuit accepted that amenities to promote the sale of commodities which are placed on, or consist of, "leased premises" can be "facilities" under section 2(e) of the Act.

In this case, the Ninth Circuit unconvincingly attempted to distinguish its own decision in *Perkins*. The Ninth Circuit reasoned that *Perkins* was inapplicable here, because in *Perkins*, the "facilities" were leased from a third party and not from the fuel wholesaler. App. 9. That distinction is irrelevant. At no other juncture in the Ninth Circuit's opinion in this case does that fact that the "leased premises" are leased from a wholesaler, as opposed to some other third-party, play any role in the panel's analysis. Nor is that third-party/wholesaler distinction incorporated by the other circuits that have held that facilities located on leased premises are not "facilities" as that word is used in section 2(e). In fact, that distinction is in conflict with a recent Second Circuit opinion, *George Haug v. Rolls Royce Motor Cars*, 148 F.3d 136 (CA 2 1998).

In *Haug*, the plaintiff, an automobile parts and service provider, alleged that the defendant, an automobile wholesaler, had violated section 2(e) of the Act by discriminating in the

provision of various facilities, *including the rent the plaintiff had to pay* to the wholesaler. The plaintiff leased the premises from affiliates of the defendant wholesaler. *Id.* at 138-39. The Second Circuit reversed the trial court's dismissal of that claim.[4] *Id.* at 145. In reaching that conclusion, the Second Circuit discussed, in detail, the rent allegations regarding the "leased premises." *Id.* at 138, 145. It is apparent from *Haug* that, contrary to the Ninth Circuit's opinion in this case, "leased premises" and the amenities thereon, can be "facilities" under section 2(e).

B. The Ninth Circuit's Narrow Reading of the Text of the Robinson-Patman Act Contradicts This Court's and other Circuit Courts' Reading of that Text.

The Ninth Circuit's creation of an ambiguity in the text of the statute clearly falls outside of this Court's instructions regarding interpretation of a statute, discussed above. The Ninth Circuit's creation of an ambiguity also creates a conflict in principle with this Court's instructions regarding interpretation of terms contained in the Robinson-Patman Act.

This Court has twice held that the undefined terms in the Act need to be interpreted broadly to effectuate the purposes of the Act. *See Perkins* 395 U.S. at 647 (refusing to apply a narrow definition of the word "customer" as that word is used in section 2(a)); *Fred Meyer,* 390 U.S. at 352 (refusing to apply a narrow reading of the word "customer" as that word is used in section 2(d)). As the Court explained in *Perkins*, to read an undefined

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[4] In *Haug*, the Second Circuit concluded that the rent allegations in the claim "are best construed as allegations of Section 2(d)." 148 F.3d at 145. However, the pertinent language in section 2(d) is identical to the language at issue in this case contained in section 2(e). Accordingly, the Second Circuit's interpretation of that language in *Haug* should govern here.

term in the act "narrowly would be wholly untenable when viewed in light of the purposes of the Robinson-Patman Act." 395 U.S. at 647. As with the limitation placed on the text of the statute by the Ninth Circuit in *Perkins*, the leased property limitation added to the Robinson-Patman Act by the Ninth Circuit in this case "is wholly an artificial one and is completely unwarranted by the language or purpose of the Act." *Id.*

The Ninth Circuit's approach in this case in narrowly interpreting the word "facilities" also is contrary to the approach taken by its sister circuits in interpreting and applying that same word. For example, in *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (CA 11 1990), the Eleventh Circuit addressed whether certain financing and promotional programs undertaken by a wholesaler were "services and facilities" within the ambit of section 2(e). That court concluded that the term "services and facilities" should be read broadly, and that "services and facilities" are things that "relate to the resale of the supplier's goods." 903 F.2d at 1424. That court then held that, whether a specific amenity or action was a service or facility under section 2(e), is a question of *fact* for the jury. *Id. See also Dantzler v. Dictograph Productions, Inc.*, 272 F.2d 172, 175-6 (CA 4 1959) (letter from wholesaler to potential customers on behalf of new distributor constituted furnishing of "services and facilities"). In contrast, in this case, the Ninth Circuit ruled that a jury determination regarding whether the facilities at the truckstop were "facilities" was outside of the jury's province.

In this case, the Ninth Circuit recognized that facilities at truckstops promote the resale of fuel. Nonetheless, the Ninth Circuit concluded, in contrast to the Eleventh Circuit in *Alan's of Atlanta*, that a non-textual narrow reading of the phrase "services and facilities" applied. That reading is misplaced, and creates a conflict in principle with the Eleventh Circuit.

The Ninth Circuit's narrow reading of the word "facilities" in this case also effectively narrows the word "purchasers" as that word is used in the statute. As was set forth at I.A, *supra*, the word "purchaser" applies to any person that purchases a commodity. However, the Ninth Circuit's opinion in this case limits those "purchasers" who may bring a section 2(e) claim only to "purchasers" that own the land on which they resell the commodity. By so doing, the Ninth Circuit limits the class of persons who may maintain a section 2(e) claim. That narrowing approach stands in stark contrast to this Court's broad interpretation of the word "customer" in both *Fred Meyer* and *Perkins*.

C. The Ninth Circuit's Narrow Reading and Application of the Legislative History of the Robinson-Patman Act Contradicts This Court's and Other Circuit Courts' Reading of that History and Inappropriately Narrows the Scope of the Act.

In this case, the Ninth Circuit applied the legislative history of the Robinson-Patman Act in a manner that flatly contradicts both this Court's and other Circuit Courts' application of that legislative history. Although the value or necessity of legislative history as an interpretive aid in this case is questionable, *see* I.C, *supra*, the Ninth Circuit's use of that history creates yet another conflict between it and other Circuit Courts of Appeal.

As was discussed above, the Ninth Circuit used legislative history in this case as a means of narrowing the scope of the Robinson-Patman Act. The Ninth Circuit concluded that, because this case did not involve the specific "evil" of "the 'Goliath' of 'huge chain stores sapping the life of local communities,' and oppressing both manufacturers and

independent realtors," the facilities at the truckstop were not facilities within the meaning of section 2(e). App. 11, 13. In other words, the Ninth Circuit basically concluded that, because the facts in this case were not identical to hypothetical facts presented in a floor debate in Congress in 1936, the Act did not apply. That use of legislative history to narrow the reach of the Act stands in contrast to both this Court's and other Circuit Courts' use of that history.

In *Falls City Industries*, this Court addressed the scope of one of the affirmative defenses contained in section 2(b) of the Robinson-Patman Act. In that opinion, this Court rejected the petitioner's argument that the Act only should be applied in cases involving large buyer preference or seller predation. This Court explained:

> "Although concerns about the excessive market power of large purchasers were primarily responsible for passage of the Robinson-Patman Act, the Act is of general applicability and prohibits discriminations generally. The determination whether to alter the scope of the Act must be made by Congress, not this Court . . ."

460 U.S. 436 (citations omitted; internal quotation marks omitted). In *Falls City Industries*, this Court explicitly stated that the legislative history of the Act must be read to give broad meaning to the provisions of the Act. The legislative history of the Act compels an inclusionary approach to the text of the Act, not the exclusionary approach taken by the Ninth Circuit in this case.

Numerous circuits have adopted that broad reading of the history of the Act when applying the Act's provisions. In *Alan's of Atlanta*, the Eleventh Circuit discussed the history of

the Act before it held that financial and promotional programs could be "services and facilities." 903 F.2d at 1422-23. Similarly, in *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1532 (CA 3 1990), *cert. denied*, 499 U.S. 921 (1991), the Third Circuit concluded that the legislative history of the Act supported an interpretation that resulted in a "wide breadth of protection afforded by the Act." Until this case, even when the Ninth Circuit turned to the legislative history of the Robinson-Patman Act as an interpretive aid, it rejected those readings of the act that would narrow its scope. *See, e.g., Chroma Lighting v. GTE Products Corp.*, 111 F.3d 653, 656-57 (CA 9) (rejecting a reading of the legislative history of the Robinson-Patman Act that would narrow the scope of the Act), *cert. denied*, ____ U.S. ____, 118 S. Ct. 357 (1997); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1446 (CA 9) (same), *cert. denied*, 516 U.S. 987 (1995).

This Court has read the legislative history of the Robinson-Patman Act to prevent "discriminations generally" and not merely to prevent discrimination between 1930s chain stores and independent resellers. Numerous circuits have adopted and applied that reading of the history of the Act to the cases that they have considered. The Ninth Circuit's opinion in this case stands in stark contrast to those opinions. If legislative history is relevant in this case, the Ninth Circuit has misapplied it in an inappropriate narrowing fashion.

III. The Ninth Circuit's Opinion Illustrates the Need for Guidance From This Court in Interpreting Section 2(e) of the Robinson-Patman Act.

In 1936, when the Robinson-Patman Act was passed by Congress and signed into law, few legislators would have been able to predict the sweeping changes that would affect the economy -- and wholesaler/distributor relations -- in the

intervening sixty years. As this case illustrates, courts, businesses and litigants are struggling to understand and apply the Act in the current business environment. Guidance is needed from this Court to define and delineate the application of the Act in these times.

Chain stores no longer are the only big players in the marketplace. Franchises of all sorts now dominate the economic landscape. The franchisee has come to replace the "mom and pop" independent reseller of the 1930s.

Land rights and land ownership also have become increasingly complex. The era of a small business people and merchants possessing a fee-simple interest in the land on which their shops rest is long past.

The Ninth Circuit's opinion in this case places the Robinson-Patman Act in a time capsule. The opinion ignores the changes that have occurred. It treats the Act as stagnant and denies the applicability of the Act to the modern era. The Ninth Circuit achieves that result by ignoring the plain meaning of the statute and this Court's (and other Circuit Courts') instructions on how that language should be interpreted.

On only one occasion has this Court interpreted and applied the provisions of section 2(e) of the Robinson-Patman Act. In that case, *Simplicity Pattern*, this Court did not address the meaning of the word "facilities" as that word is used in section 2(e). Although this Court has interpreted other provisions of the Robinson-Patman Act, including sections 2(b) and 2(d), which also contain the phrase "services or facilities," this Court never has interpreted that phrase.

It is time for this Court to look again at section 2(e) of the Robinson-Patman Act. At least three circuits improperly have added a non-textual exception to that section of the Act for

facilities located on leased property. Unless this Court steps in and corrects that mistake, those holdings will remain the unchecked majority rule. Finally, the circuits appear to be split as to how to apply the applicable legislative history to the language of the Act.

Without guidance from this Court, the circuits will continue to eviscerate the Robinson-Patman Act. Similarly, the circuits will produce inconsistent applications of the history of that Act to reach conflicting and inconsistent results. For the foregoing reasons, review in this Court of the Ninth Circuit's opinion in this case is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

PORTLAND 76 AUTO/TRUCK PLAZA, INC.,

Petitioner,

v.

UNION OIL COMPANY OF CALIFORNIA, dba UNOCAL, NATIONAL AUTO/TRUCKSTOPS, INC.,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

APPENDIX
TO PORTLAND 76 AUTO/TRUCK PLAZA, INC.'S PETITION FOR A WRIT OF CERTIORARI

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APPENDICES

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PORTLAND 76 AUTO/TRUCK PLAZA, INC.,
Plaintiff-Appellant,
v.
UNION OIL COMPANY OF CALIFORNIA, dba
Unocal Corporation; National
Auto/Truckstops Incorporated, Defendants-
Appellees,
and
Gordon A. Barron, Jr.; Joan L. Barron,
Counter-Defendants- Appellants,
PORTLAND 76 AUTO/TRUCK PLAZA, INC.,
Plaintiff-Appellee,
v.
UNION OIL COMPANY OF CALIFORNIA, dba
Unocal Corporation, Defendant-Appellant,
and
National Auto/Truckstops Incorporated; William
Osborne; Paul Kohler,
Defendants.

Nos. 95-35543, 9536022.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 5, 1996.

Decided Aug. 19, 1998.

Jeffrey M. Batchelor, Lane, Powell, Spears & Lubersky, Portland, Oregon, for defendant-appellee, cross-appellant.

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APPENDIX A

Appeals from the United States District Court for the District of Oregon John Jelderks, Magistrate Judge, Presiding. D.C. Nos. CV-92-01635-JJ, CV-92-01635-JAJ.

Before: CANBY, RYMER and KLEINFELD, Circuit Judges.

KLEINFELD, Circuit Judge:

A fuel wholesaler improved one leased truck stop less than others. Did this violate the Robinson-Patman Act, 15 U.S.C. § 13 et seq., or Petroleum Marketing Practices Act, 15 U.S.C. § 2801 et seq.? The lease? The Robinson-Patman Act issue turns out to be especially difficult.

I. FACTS

Unocal made two agreements with Portland 76, in 1978. It leased a truck stop in Oregon to Portland 76, and contracted to sell Portland 76 motor fuel for resale. The lease in effect at the times relevant to most of the issues in this case ran from April 1, 1991 to February 28, 1994. No option to renew was included in the lease, and it provided for automatic expiration without notice February 28, 1994. The truck stop became seedy over the years. More attractive and convenient truck stops, including Unocal truck stops, could better attract truck drivers to pull in. Portland 76's theory of the case was that Unocal should have improved the truck stop commensurately with other Unocal truck stops, and in letting it go downhill, breached both its lease obligations and its Robinson-Patman duty not to discriminate among the retailers to whom it sold fuel.

The lease included an extraordinarily detailed allocation of maintenance responsibilities. In addition to a general statement of responsibilities for cleaning, maintenance and replacement, the lease included an 18 page table specifying whether Unocal or

Portland 76 was responsible for cleaning, maintenance or replacement of such items as "yard sign & lighting," light bulbs for the sign on the highway, even the hot chocolate dispensers in the restaurant. In general, the lease required Portland 76 to clean and do light maintenance, Unocal to do heavy maintenance and replacement of equipment. The lease did not require either party to make improvements. Portland 76 was not permitted to make permanent modifications without Unocal's written consent.

Though the lease did not entitle Portland 76 to any improvements, as a practical matter Unocal sometimes made them. Its money, after all, came from fuel sales, not just rent. Portland 76 asked Unocal to improve the truck stop much more than it did, and expressed concern to Unocal about losing market share to better facilities. Some evidence suggested that the track stop had been badly designed and built by Unocal years earlier. Unocal and Portland 76 together planned such improvements as converting some motel rooms to conference and training rooms, redesigning the convenience store, improving fuel pumping rates, putting in a day care center, and expanding the shower and laundry facilities. A number of planned improvements were never made.

As the Portland 76 truckstop deteriorated, Unocal improved competing truckstops. The evidence showed that big trucks had a fuel range of 1,600 to 1,800 miles on a tank, so Portland 76, near Portland, was competing with truck stops as far away as Northern California. Portland 76 proved that Unocal spent much more money between 1987 and 1990 renovating and upgrading its truckstops in Redding, Sacramento, and Santa Nella, California, than on the Portland 76 truckstop.

The difference in expenditures was disproportionate to the amounts of fuel sold or rent paid at the various truckstops. The California truckstops sold more fuel, but less than twice as

much, yet Unocal's improvement expenditures were well over twice as much during 1987-90. Likewise, the rent on the California truckstops was less than twice the rent on Portland 76.

Portland 76's market share declined relative to the California Unocal truckstops. All the Unocal truckstops had decreased sales for the relevant period, but evidence suggested that part of Portland 76's sales decline was attributable to its facility becoming less attractive relative to the other Unocal facilities. The jury heard that the truckstop's highway signs needed to be replaced, the roof leaked in the restaurant, the showers were in bad condition, the heating and air conditioning in the restaurant were inadequate, the parking lot was full of potholes, the sewage system stank on hot days, and the fuel lanes were too narrow.

Unocal got out of the truckstop business in 1993. It sold its truckstops, including Portland 76, to National Auto/Truckstops, and assigned Portland 76's lease. National and Portland 76 agreed that National would sell it fuel, and Portland 76 made a new lease with National, in December 1993, effective upon the expiration of the Unocal agreements (though Portland 76 signed under protest).

Portland 76's claims against Unocal went to jury trial. The jury found that Unocal breached its lease, causing $1 million in damages by the end of the term. In addition, the jury found that Unocal violated the Robinson-Patman Act in connection with the furnishing of facilities, causing the same $1 million damages as the lease violations, plus another $1,307,440 not included in the lease damages. That is, Portland 76 lost $1 million because of things Unocal was obliged to do both under the lease and under the Robinson-Patman Act, and lost another $1,307,440 because of things Unocal was not obliged to do under the lease, but was under the Act. The sum of the two damages items was trebled, pursuant to 15 U.S.C. § 15, to almost $7 million.

APPENDIX A

Though the case went to a jury, a number of issues were resolved as a matter of law. Portland 76's Petroleum Marketing Practices Act claims were dismissed on summary judgment. Also, the court determined as a matter of law that neither the Robinson-Patman Act damages nor lease damages could accrue beyond the end of Portland 76's lease.

Both sides have appealed. Portland 76 appeals the limitation on damages to the lease period, and dismissal of the Petroleum Marketing Practices Act claim. Unocal appeals the decision to allow the Robinson-Patman Act claim to go to the jury at all. Under Unocal's theory, improvements to realty leased by the seller to the buyer should not be treated as discrimination in the furnishing of facilities under 15 U.S.C. § 13(e).

II. ANALYSIS

A. Robinson-Patman Act Claims

The most difficult issue in this case is whether the Robinson-Patman Price Discrimination Act applies to the truck stop as a "facility." Portland 76 won its verdict on the theory that it does, but Unocal argues that as a matter of law, it does not.

The Robinson-Patman Act generally makes it unlawful for a wholesaler to discriminate in price between different purchasers of similar commodities, subject to a number of exceptions and to a qualified exception relating to quantity. 15 U.S.C. § 13(a). Obviously a clever wholesaler wishing to discriminate could evade a simple command by keeping the nominal price the same for everyone, but offering better terms to favored customers. And more powerful customers could, if permitted, pressure a wholesaler to do that. Several subsections of the statute deal with disguised discounts, such as commissions, benefits to customers, and provision of services and facilities. 15 U.S.C. §§ 13(c), (d), (e).

APPENDIX A

Portland 76 sued for disguised price discrimination by discriminatory provision of "facilities," which the statute prohibits:

> It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without process, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers in proportionally equal terms.
> 15 U.S.C. § 13(e).

1. Statutory language.

Ordinarily we begin with the language of the statute. The statutory language can be read to treat a leased truck stop as a "facility," as Portland 76 successfully claimed in district court. Reading it to include leaseholds, however, would put us in conflict with the two other circuits who have considered the question, and would expand the statute far beyond its established administrative construction. Because a possible literal reading conflicts with the well established reading, and because the language is extremely general and subject to different constructions, the issue of how to construe the statutory language is difficult.

Portland 76 was a "purchaser" in the sense of the statute, of a "commodity bought for resale," fuel for trucks. Its theory was that Unocal furnished "facilities connected with the ... sale" of the fuel "upon terms not accorded to all purchasers on proportionally equal terms," because some truck stops leased from Unocal received improvements to their facilities that were far more than proportional to the relative amounts of fuel they sold. The district court adopted this theory, by denying a motion

for judgment as a matter of law, and instructing the jury that what Portland 76 had to prove was that "Unocal discriminated against it in favor of at least one other Unocal-franchised truck stop through Unocal's furnishing of any facilities connected with the resale of fuel to customers."

Is leased real estate a "facility" in the sense of the statute? Arguing in favor, "facilities" is a broad and general term, and a truck stop is "connected with" the sale of fuel to truckers. Arguing against is an instinct that the magistrate judge gave voice to, that it does not make sense for someone who rents a Chevrolet to demand a Cadillac. Can a tenant agree to a lease provision that the landlord does not have to do something, and then if the landlord does it for another truck stop operator, insist that the landlord do what they had agreed the landlord did not have to do? No one would be able to rent an old, run down truck stop cheap, if the landlord had to do substantially more than the lease required to comply with the Robinson-Patman Act. Nevertheless, if the statutory command were plain from its language, that would be the end of the discussion.

The statutory phrase refers to discrimination in "contracting to furnish or furnishing ... services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased." 15 U.S.C. § 13(e). Did Congress address leasing of realty in the phrase "contracting to furnish ... facilities connected with ... sale"? Leases were spoken of in the 1930's, more than they are now, as conveyances of non-freehold estates in land (chattels real), not merely as contracts, though they had contractual aspects as well. Moynihan, Introduction to the Law of Real Property 70 (1962) ("courts, for the most part, have refused to apply modern principles of contract law to leases"); Cribbett, Fritz & Johnson, Property--Cases and Materials 335 (2d ed. 1966). "But the law as to leases is not a matter of logic *in vacuo*; it is a matter of history that has not

forgotten Lord Coke." *Gardiner v. William S Butler & Co., Inc.*, 245 U.S. 603, 605, 38 S.Ct. 214, 62 L.Ed. 505 (1918) (Holmes, J.). Considering what the words connoted when Congress used them, it is questionable whether "contracting to furnish facilities" included leased realty.

On the other hand, were the word "facilities" to be defined simply by substituting a general dictionary definition for the term in the statute, it might well include realty leased by a wholesaler to a retailer for sale of the wholesaled goods. The word has been defined as "A thing that promotes the ease of any action, operation, transaction, or course of conduct; advantage; opportunity;--usually in pl.; as, special facilities for study." Webster's New International Dictionary 908 (2d ed. 1943). A more recent dictionary definition is "something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end." Webster's New International Dictionary 812-13 (3d ed. 1981).

The Supreme Court ruled upon various Robinson-Patman issues, but without expressly construing the statutory term "facilities" in *Federal Trade Comm. v. Simplicity Pattern Co., Inc.*, 360 U.S. 55, 79 S.Ct. 1005, 3 L.Ed.2d 1079 (1959). The Court applied the "services," "facilities" and "terms" provisions to the different arrangements a manufacturer of clothing patterns used in sales to variety stores and to fabric stores. The variety stores bought on consignment, the fabric stores for cash; the variety stores got several things free that the fabric stores had to pay for--metal cabinets to hold the patterns, catalogs, and transportation costs. In a footnote, the Court mentioned other "services and facilities" furnished to the fabric stores but not the variety stores: traveling demonstrators, promotional posters, instructional brochures for merchants, and monthly publications. *Id.* at 61 n. 4, 79 S.Ct. 1005. Though the Court did not expressly

construe the term "facilities," the examples are suggestive of what the Court understood the term to mean.

We have never held one way or the other whether leased premises can be "facilities." We said in dicta, in *Standard Oil Company of California v. Perkins*, 396 F.2d 809, 814 (9th Cir. 1967), *reversed on other grounds*, 395 U.S. 642, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969), that a fuel wholesaler was obligated to "make the same proportional payments and allowances to Perkins for such items as service station rest room maintenance, painting of service stations, advertising and credit card privileges, as it did to the Branded Dealers." The remark may have been addressing allowances to firms operating service stations they owned themselves or leased from third parties, as opposed to stations leased from the fuel wholesaler, because the opinion does not say that the dealers were operating gas stations leased from the fuel wholesaler. The issue raised in *Perkins* was whether the disguised discount prohibition applied to paying branded dealers but not independents allowances for cleaning their own rest rooms. That is a different issue from whether premises leased from the wholesaler are "facilities" for purposes of the Act. We mentioned "facilities" in *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313 (9th Cir. 1979), but only in the context of whether selling identical mobile homes to a competing retailer but not the franchisee was "discrimination" in the Robinson-Patman sense; leased realty was not at issue.

Two other circuits have held that leased real estate cannot be a facility for purposes of the Robinson-Patman Act. The Sixth Circuit has held that "The Act is not concerned with . . . a lease of realty." *Export Liquor Sales, Inc. v. Ammex Warehouse Company*, 426 F.2d 251, 252 (6th Cir. 1970). The Fourth Circuit likewise held that real estate leases are not "facilities" for

purposes of the Robinson-Patman Act prohibition. *Hinkleman v. Shell Oil Company*, 962 F.2d 372, 380 (4th Cir. 1992).

The Sixth Circuit decision does not say why leased realty is not "facilities connected with the .. sale... of such commodity," in the sense intended by 15 U.S.C. § 13(e). The Fourth Circuit explains that service stations "do not actively promote the resale of gasoline" but "merely facilitate .. resale." *Hinkleman*, 962 F.2d at 380. We are not sure of the tenability of the *Hinkleman* distinction between active promotion and mere facilitation, but regardless, it is significant that two circuits have ruled that leased real estate cannot be "facilities" and none have ruled that it can be. Because of the importance of predictability to commercial relations, as well as deference to our sister circuits, we shall not lightly create an intercircuit conflict affecting commerce nationally.

What is troubling about treating realty leased from the wholesaler as "facilities" for purposes of the Act is that Unocal and Portland 76 had two commercial relationships, not merely one. In their relationship as wholesaler and purchaser of fuel for resale, Unocal was prohibited by law from discriminating in the furnishing of facilities. But in their relationship as landlord and tenant, Unocal was selling something unique, a possessory interest in particular real estate, rather than something fungible, fuel. The word "discriminate" connotes treating like objects differently, so it is hard to apply the word to the leasing of real estate, ordinarily considered unique.

2. Legislative history.

Even if we were prepared to treat legislative history as authoritative, we have found no mention in it of whether it was anyone's intention to treat leased realty as "facilities." The legislative history does have some value, though. It tells us what social problem Congress addressed with this statute more than

six decades ago. The statute and not the legislative history tells us what solution Congress adopted for the problem, but the legislative history is useful to determine what the problem was. Without the history, it is not immediately apparent what problem that long ago Congress was talking about.

It is perfectly plain from the legislative history that "the evil" addressed by the Act was the "Goliath" of "huge chainstores sapping the life of local communities," and oppressing both manufacturers and independent retailers. *Remarks of Rep. Wright Patman Introducing H.R. 8442*, 79 Cong. Rec. 9077 (1936), *reprinted in* Legislative History, supra at 2927. *See* H.R.Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. (1936), *reprinted in* The Legislative History of the Federal Antitrust Laws and Related Statutes 3183 (Earl W. Kintner, ed. 1980); *Simplicity Pattern Co.*, 360 U.S. at 69, 79 S.Ct. 1005 (citing *e.g.*, *Final Report on the Chain-Store Investigation*, S. Doc. No. 4, 74th Cong., lst Sess. (1935)); *Fred Meyer, Inc.*, 390 U.S. at 350-51, 88 S.Ct. 904; *Great Atlantic & Pacific Tea Company v. Federal Trade Commission*, 440 U.S. 69, 75-76, 99 S.Ct. 925, 59 L.Ed.2d 153 (1979).

> Comparable competitive advantages were obtained by the large purchasers in several ways other than direct price concessions. Rebates were induced "for brokerage fees," even though no brokerage services had been performed. "Advertising allowances" were paid by the sellers to the large buyers in return for certain promotional services undertaken by the latter. Some sellers furnished special services or facilities to the chain buyers. Lacking the purchasing power to demand comparable advantages, the small independent stores were at a hopeless competitive disadvantage. *Simplicity Pattern*, 360 U.S. at 69, 79 S.Ct. 1005.

APPENDIX A

Opposition reflected the theme that "the consumer is made the goat" by depriving him of the efficiencies which competition by national chainstores, and their ability to obtain quantity discounts and pass them on, could bring. H.R.Rep. No. 2287, Pt. 2, 74th Cong., 2d Sess., (1936) (quoting the minority view of Representative Emmanuel Celler), *reprinted in*, Legislative History, *supra* at 3201. But the small local retailers prevailed, the chain stores lost.

> The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability.

Federal Trade Comm'n v. Morton Salt Co., 334 U.S. 37, 43, 68 S.Ct. 822, 92 L.Ed. 1196 (1948).

The present subsection (e) attacked "secret discriminations," *Simplicity Pattern Co.*, 360 U.S. at 69 n. 12, 79 S.Ct. 1005, such as disguised advertising and promotional discounts to the chainstores:

> Still another favored medium for the granting of oppressive discriminations is found in the practice of large buyer customers to demand, and of their sellers to grant, special allowances in the purported payment of advertising and other sales promotional services, which the customer agrees to render with reference to the sellers' products, or sometimes with reference to his business generally. Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when in any case the customer is deriving from it equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own

> advertising cost, while his smaller competitor, unable to command such allowances, cannot do so.
>
> Section [2(e)] of the bill addresses this evil by prohibiting the granting of such allowances unless made available to all other customers of the seller concerned on proportionally equal terms, or unless in the rendition of such services the customer's own business is kept out of the picture.

H.R.Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. (1936), *reprinted in* Legislative History, *supra* at 3193-94. Examples Representative Patman gave of the disguised price discrimination to be remedied were proportionally unequal "window display services, newspaper lineage, billboard posters," and allowances to have clerks promote a manufacturer's products. Remarks of Rep. Wright Patman Introducing H.R. 8442, 79 Cong. Rec. 9077, *reprinted in*, Legislative History, *supra* at 2928.

The problem to which Portland 76's theory in the case at bar was addressed is discrimination in rental arrangements. Discrimination against a franchisee as tenant by a franchisor is different from use by chain stores of their market power to force wholesalers to discriminate against small local stores. That is not to say the franchisee problem is not serious, only to say that it is different. The legislative history shows that Congress addressed a different harm from the one Portland 76 suffered. This history is not decisive, but it bears on how the statutory words should be read.

3. Administrative interpretation.

There is a long established administrative interpretation by the Federal Trade Commission of the Act's prohibition on discriminatory furnishing of services and facilities. Because Congress did not make plain in the statutory language whether

the prohibition applied to leased realty, we give "considerable weight" to an agency's interpretation of a statute it is entrusted to administer. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The regulation provides a list of "examples--the list is not exhaustive." 16 C.F.R. § 240.7. Here is the entire list of examples:

> Cooperative advertising;
> Handbills;
> Demonstrators and demonstrations;
> Catalogues;
> Cabinets;
> Displays;
> Prizes or merchandise for conducting promotional contests;
> Special packaging, or special package sizes.

16 C.F.R. § 240.9. The regulations also include a list of examples illuminating "proportionally equal terms," such as promotional allowances. 16 C.F.R. § 240.9.

Because the regulation expressly provides that the list is not exhaustive, it cannot be read pursuant to the principle *expressio unius est exclusio alterius*. *Cf. Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312-13 (9th Cir. 1992). The list purposely does not exhaust the category of services and facilities with respect to which wholesalers cannot discriminate, because that would invite evasion. The items in the list are helpful, though, as illustrations of "services" and "facilities" as those terms have long been understood by the agency. The terms "services" and "facilities" can be usefully construed in light of the administrative list of examples and the principle *ejusdem generis*, i.e., of the same kind, and *noscitur a sociis*, i.e., known by its associates. *See United States v. Baird*, 85 F.3d 450, 453 (9th Cir.1996). Though lawyers do not learn as much Latin as

they used to, there is nothing esoteric about listing a series of examples and considering whether something else is like the things in the list. If a retailer or wholesaler were asked which did not belong in the list--advertising allowances, handbills, demonstrators, catalogues, cabinets, displays, prizes, special packaging, and leased realty--almost everyone would pick out leased realty as being different. Thus the long established administrative interpretation shows an understanding that leased realty is not "facilities" in the statutory sense.

4. Conclusion.

In sum, we have a word, "facilities," in the statute, that might be read to include leased realty or not. The dictionary definitions suggest inclusion, but the historical context, constructions by other circuits, and the administrative construction, all indicate that something narrower is intended.

It has long been understood that a word in a statute cannot be understood simply by substituting for the word its dictionary definition. Justice Holmes explained that, even though the dictionary definition of "vehicle" might include airplanes, the usage in a federal vehicle theft act -- "automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not running on rails"--did not, because of the connotations of everyday speech and the limitations implied by the list of examples. *McBoyle v. United States*, 283 U.S. 25, 51 S.Ct. 340, 75 L.Ed. 816 (1931).

One oft-noted reason why dictionary definitions cannot be substituted mechanically for words in a statute are that there are too many dictionary definitions per word. *Cf. United States v. Foster*, 133 F. 3d 704 (9th Cir. 1998), *overruled sub silentio*, *Muscarello v. United States*, ---- U.S. ----, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998). Another is that dictionary definitions conventionally are intentional rather than extensional. An

intentional definition describes the properties a thing must have to be characterized by the word. By contrast, an extensional definition lists the things the word designates. See Wesley C. Salmon, Logic 90-91 (1963). Cases, regulations, and legislative history work something like an extensional definition, illustrating a number of things the word designates, and suggesting that it also includes other things like the ones listed. There is no logical reason to say that the definition of a word is its intentional definition, as opposed to its extensional definition; its definition is both, and both are hard to do right.

Any intentional definition, which is to say, any conventional dictionary definition, is likely to be too broad or too narrow, in the context of a particular statute. It will frequently embrace more than the legislature meant to include. And any extensional definition is likely to be too narrow, because clever evaders will always invent ways to achieve the forbidden purpose that the legislature did not think of. Use of an intentional identification of what the statute prohibits, narrowed by extensional identification of examples, is a common sense way to apply the statute to what the words in context mean. Though the terms "intentional" and "extensional" are not much used in everyday speech, ordinary speech is full of general definitions followed by "for example" lists.

A lease of a truckstop is not like a display cabinet for paper dress patterns, *Simplicity Pattern Co.*, 360 U.S. at 60, 79 S.Ct. 1005, an extra sales clerk to push a brand of cosmetics in a department store, *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 994 (8th Cir. 1945), or mailings to prospective customers advertising certain product lines, *Zwicker v. J.I. Case Co.*, 596 F.2d 305, 310 (8th Cir. 1979) (construing § 13(d)). Nor is a franchisor's leasing of a truckstop to its franchisee like a wholesaler's payment of a retailer's rent to a third party. *See George Haug Co., Inc. v. Rolls Royce Motor Cars Inc.*, 148 F.3d

136, 144 (2d Cir. 1998). Among the differences is what caught the eye of the Fourth and Sixth Circuits--the truckstop is realty leased from the wholesaler. Because realty leased by the wholesaler to the retailer is so different from what the words "services and facilities" have meant in the statute, we conclude that it is not a "facility" in the sense of the statute.

Accordingly, we conclude that realty leased to a purchaser of goods for resale, by the party that sells the goods to that purchaser, is not "facilities connected with" the sale in the sense of the Robinson-Patman Act. That leads to the conclusion that the portion of the jury verdict awarding damages for Robinson-Patman Act violations based on Unocal's having discriminated against Portland 76 in providing services and improvements to the real estate must be vacated. Unocal is correct in its argument that it was entitled to judgment as a matter of law that the Robinson-Patman Act did not allow damages for discrimination in the provision of realty, even if the leased realty was used to sell the goods purchased from the landlord for resale at the realty.

B. Lease Damages

1. Sufficiency of evidence.

Portland 76 argued that the jury ought to award $2,355,000 in damages for breach of Unocal's obligations under the lease. The jury in its special verdict awarded $1 million for damages caused by breach of the lease, and $2,307,440 caused by violation of the Robinson-Patman Act (the jury wrote that $1,307,440 of this figure was not included in the breach of lease damages, and $1,000,000 was).

Unocal appeals this award on the ground that there was insufficient evidence for the jury to reach it. The argument is that Portland 76's expert witness did not segregate the lease

damages from the Robinson-Patman damages, so neither could the jury. Unocal correctly argues that it was the plaintiff's burden to put on proof from which the jury could ascertain damages with reasonable certainty. *See Vonravensberg v. Houck-Carrow Corp.*, 60 Or. App. 412, 653 P. 2d 1297, 1299-1300 (1982).

It is true that the expert witness did not segregate the damages. He gave the jury the bottom line from a spreadsheet he prepared projecting his estimate of the financial loss from failure to "improve, renovate, and do more maintenance" at the truck stop. He did not give two projections, one based on what the lease covered, and another based on proportional improvements to other Unocal truckstops. The jury could not have used any bottom line from this expert witness as its damages figure.

The trial judge denied the motion for judgment because in his view the jury had before it other evidence from which it could rationally segregate the damages. Also, he concluded, the jury had sufficient data so that it could calculate damages without the assistance of an expert. The lease is extremely detailed with respect to what Unocal was obligated to do, and the jury was instructed that the "lease does not provide that Unocal is required to remodel, upgrade or improve the entire truckstop facility or any component part, other than as provided in Exhibit C to the lease." The judge was within his discretion in evaluating the evidence as sufficient to go to the jury on damages. That the jury did segregate damages is apparent from its having awarded $1,304,440 less for breach of the lease than for non-lease Robinson- Patman damages. The jury may have used a different theory from the one plaintiff's expert witness used to calculate the damages. Though necessarily an estimate (as any expert's opinion would have had to have been), the award was not excessively speculative. *Cf. State Highway*

Commission v. Central Paving Co., 240 Or. 71, 76-77, 399 P.2d 1019, 1023 (1965); *Valley Inland Pacific Constructors, Inc. v. Clackamas Water District No. 2*, 43 Or. App. 527, 533, 603 P. 2d 1381, 1386 (1979).

2. Termination of damages.

The trial judge held that as a matter of law, the jury could not award damages for Unocal's breaches of its lease obligations, to the extent that such damages might have accrued after the end of the lease. Portland 76 argues that this was mistaken, because damages were foreseeable subsequent to the lease period. Portland 76 argues that *Harold Schnitzer Properties v. Tradewell Group, Inc.*, 104 Or. App. 19, 799 P. 2d 180 (1990), and *Vonravensberg v. Houck-Carrow Corp.*, 60 Or. App. 412, 653 P.2d 1297 (1982), so hold.

The trial judge was correct. Harold Schnitzer Properties is irrelevant, because it is an appeal from an arbitration award, and the court held that arbitrators have the power to decide the law and act within their authority even if they apply the law erroneously. Vonravensberg is also irrelevant, because it is a tort action against a third party, not an action by a tenant against its landlord for breach of the lease.

A third party is not necessarily entitled to take advantage of a landlord's right to end a lease, where it is foreseeable that the landlord will renew the lease. That is the proposition supported by Vonravensberg. But a landlord is entitled to take advantage of its own lease provision providing a termination date to the tenant's right to possess the property and profit from possession. Unocal's duties to Portland 76 regarding the real estate ended when the lease ended. Leaseholds that end do not, by their very nature, bind the parties indefinitely. *United States v. 42.13 Acres of Land*, 73 F.3d 953, 956 (9th Cir.1996). We held in an

analogous case that a landlord does not have to "pay for its own contractually preserved right to do as it chooses":

> It is one thing for the market to value the probability that a third party will exercise its liberty in a particular way, and make [a defendant] pay for that market value, but quite another to make [the defendant] pay for its own contractually preserved right to do as it chooses.

42.13 Acres of Land, 73 F.3d at 956.

Portland 76 argues that because Unocal failed to perform its maintenance duties under the lease, it began its relationship with its new landlord, National, with an inferior facility, and that led to subsequent damages, citing *Arnott v. American Oil Co.*, 609 F.2d 873, 887 (8th Cir. 1979). Arnott does involve a lease by the defendant to the plaintiff, but is not in point, because the theories upon which damages for the period subsequent to the lease were awarded were fraud, breach of fiduciary duty, and price fixing in violation of antitrust laws, not breach of the lease. Unocal had no duty under its lease with Portland 76 to ensure that Portland 76's next lease with a different lessor was of a particular grade of facilities.

C. Petroleum Marketing Practices Act

Portland 76 claimed damages for violations of the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-06. The theory was that Unocal had constructively terminated Portland 76's franchise by (1) assigning the lease and franchise to National, because National charged more for fuel, on worse terms; (2) Unocal failed to give required notice of termination; and (3) Unocal was responsible for nonrenewal because National conditioned renewal on payment of a fee that Unocal had not required. The trial judge granted Unocal's motion for summary judgment on these claims, and Portland 76 appeals.

APPENDIX A

Portland 76 did not go out of business when Unocal assigned its franchise to National. Its franchise continued with the assignee, National. It claims constructive termination. We assume for purposes of discussion, but do not decide, that constructive termination may give rise to a claim under the Act. *See Little Oil Co., Inc. v. Atlantic Richfield Co.*, 852 F.2d 441, 444 n. 4 (9th Cir. 1988).

For the assignment to have amounted to a constructive termination, it would have had to force Portland 76 out of its business, either by breaching Unocal's underlying franchise obligations, or violating state law. *Cf. May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 922 (6th Cir. 1989). The assignment did not force Portland 76 out of business. It stayed in business until the time came for renewal.

Nor did the assignment violate Oregon law. Under Oregon law, "all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on the other party by the contract." Or. Rev. Stat. 72.2100(2). Portland 76 established no genuine issue of fact as to whether, as it claimed, the assignment materially increased its burdens. The increased franchise fee was for renewal in 1994, not on the franchise assigned, and the franchise assigned had no provision prohibiting such a fee on renewal. The increased prices for fuel and worse terms on such items as credit card fees were not contrary to the Unocal franchise. Though National increased Portland 76's burdens, the assignment did not. Portland 76 argues that National breached its lease by continuing to allow the real estate to deteriorate, but that was not caused by the assignment.

Portland 76 argues that when Unocal assigned the Portland 76 franchise to National, it knew National would subsequently

demand terms and prices "not in response to changing market conditions or consumer preferences" but rather charged more because of its own financial needs. The statute does not say that a franchisor has to limit changes in its prices and terms to "response to changing market conditions or consumer preferences." The statute says changes must be "in good faith and in the normal course of business." 15 U.S.C. § 2802(a)(3)(A)(i). Portland 76's standard for changes is based, not on the statutory language, but on a remark in a Senate Report that franchisors needed flexibility "to respond to changing market conditions and consumer preferences":

> Legislation in this subject area requires recognition of the legitimate needs of a franchisor to be able to terminate a franchise or not renew a franchise relationship based upon certain actions of the franchisee, including certain failures to comply with contractual obligations or upon certain changes in circumstances. Particularly important is that legislation dealing with this subject recognize the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences.

S.Rep. No. 731, 95th Cong., 2d Sess. 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 877. The statute states the standard, and this argument for flexibility does not change it. We have held that a franchisor meets the statutory good faith requirement "so long as the franchisor does not have a discriminatory motive or use the altered terms as a pretext to avoid renewal":

> Courts have construed [15 U.S.C. § 2802(b)(3)(A)] as precluding judicial second-guessing of the economic impact of an otherwise legitimate business decision by the franchisor. So long as the franchisor does not have a discriminatory motive or use the altered terms as a pretext to

avoid renewal, the franchisor has met the burden required by the PMPA for determining good faith. *Valentine v. Mobil Oil Corp.*, 789 F.2d 1388, 1392 (9th Cir. 1986) (internal quotation omitted).

We have carefully examined the record, and concluded that with respect to all its arguments regarding the Petroleum Marketing Practices Act, Portland 76 did not establish a genuine issue of material fact.

III. CONCLUSION

We AFFIRM the portion of the judgment awarding $1,000,000 for breach of the lease, VACATE and REVERSE that portion awarding Robinson-Patman Act damages, and AFFIRM the judgment in the other respects challenged. Each party to bear its own costs.

APPENDIX A

NOT FOR PUBLICATION
FILED OCT. - 7 1998
UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PORTLAND 76 AUTO TRUCK PLAZA, INC.,	)	No. 95-35543
Plaintiff-Appellant,	)	D.C. No. CV-92-01635-JJ
v.	)	
UNION OIL COMPANY OF CALIFORNIA, dba Unocal Corporation; NATIONAL AUTO/TRUCKSTOPS INCORPORATED,	)	
Defendants-Appellees,	)	
v.	)	
GORDON A. BARRON, JR.; JOAN L. BARRON,	)	
Counter-Defendants-Appellants.	)	
PORTLAND 76 AUTO/TRUCK PLAZA, INC.,	)	No. 95-36022
Plaintiff-Appellee,	)	D.C. No. CV-92-01635-JAJ
v.	)	ORDER

APPENDIX B

UNION OIL COMPANY OF CALIFORNIA, dba Unocal Corporation,	)
Defendant-Appellant,	)
and	)
NATIONAL AUTO/TRUCKSTOPS INCORPORATED; WILLIAM OSBORNE; PAUL KOHLER,	)
Defendants.	)

Before: CANBY, RYMER and KLEINFELD, Circuit Judges.

The panel has voted to deny appellant Portland 76's petition for rehearing. Judges Rymer and Kleinfeld have voted to reject the suggestion for rehearing en banc, Judge Canby so recommends.

The full court was advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND 76 AUTO/TRUCK PLAZA, INC., Plaintiff, v. UNION OIL COMPANY OF CALIFORNIA, dba UNOCAL, NATIONAL AUTO/TRUCKSTOPS, INC., WILLIAM OSBORNE, and PAUL KOHLER, Defendants, v. GORDON A. BARRON, JR., and JOAN L. BARRON, FRCP 13(h) Defendants.	Civil No. 92-1635-JE ORDER

JELDERKS, Magistrate Judge:

Pursuant to the verdict rendered in a jury trial, this court has entered a judgment awarding plaintiff Portland 76 Auto/Truck Plaza, Inc. (Portland 76) $1,000,000 on its claim of breach of

contract and $2,307,440, trebled to a total of $6,922,320 on its claim for violation of the Robinson-Patman Act.[1] The judgment specifies that plaintiff is entitled to recover the costs incurred in bringing the Robinson-Patman claim, including reasonable attorney fees and expenses. It also notes that several of plaintiff's claims, including a claim of violation of the good faith requirement imposed by the Oregon Motor Fuel Franchises Act, a claim alleging violation of the federal Petroleum Marketing Practices Act (PMPA), portions of Portland 76's claim for declaratory judgment, and a claim alleging violation of the Oregon Anti-Price Discrimination Act, were dismissed pursuant to earlier rulings of the court.

Defendant UNOCAL has moved for judgment as a matter of law, for a new trial, or for remittitur. At the conclusion of oral argument concerning that motion, I informed the parties of my intent to deny those motions, and to note that denial in the present order setting out what fees and costs Portland 76 will recover in this action.

Bill of Costs

Portland 76 seeks recovery of $32,015.74 in costs incurred in this action. UNOCAL objects to the inclusion of the $15,734.25 plaintiff spent on daily transcripts, $2,043.75 plaintiff spent to take the depositions of several employees of defendant National, and $444 plaintiff spent on copies of the depositions of plaintiff's employees taken by National.

Courts may award the costs of daily transcripts that are "necessarily obtained" for a case. Alflex Corp. v. Underwriters Laboratories, Inc., 914 F.2d 175, 177 (9th Cir. 1990), cert. denied, 502 U.S. 812 (1991). Here, I conclude that, though

[1] As noted in the judgment, the damages awarded on the breach of contract claim are encompassed in those awarded under the Robinson-Patman claim.

plaintiff may have found daily transcripts useful, they were more convenient than necessary. In addition, it generally has not been the practice in this District to allow recovery of these costs. I therefore am not allowing Portland 76 to recover the costs of obtaining those transcripts.

Turning to the depositions of National employees taken by Portland 76, I note that these primarily concerned the claims against National, not UNOCAL. There was some overlap of issues related to UNOCAL and National, however, and I conclude that the parties should share the costs of taking these depositions. I therefore will allow recovery of half of the amount Portland 76 requests, and will consequently reduce the amount of the cost bill by $1,022. I am not, however, allowing recovery of the costs of obtaining copies of the depositions of plaintiff's employees taken by National. The cost bill is further reduced $444 to reflect this decision.

Deducting the cost of the daily transcript, half the costs of deposing several of National's employees, and the costs of obtaining copies of the depositions of plaintiff's employees, I will award costs to Portland 76 in the amount of $14,815.49.

Attorney Fees and Expenses

Portland 76 originally sought recovery of $547,267.25 in attorney fees expended in this action. It also asked that these fees be doubled on the grounds that actions brought pursuant to the Robinson-Patman Act are "undesirable." In its supplemental request, it now seeks recovery of $726,276.83 in attorney fees, reflecting both an increase in the per-hour rate sought for several of its attorneys, and adding the amount expended in contesting post-trial motions and in preparing its request for attorney fees and expenses. Portland 76 asserts that it has incurred "unenhanced fees" of $66,169 since the filing of its original petition for fees.

APPENDIX C

In the alternative, Portland 76 now seeks recovery of those fees plus a multiplier of at least 1.33, raising the amount sought to at least $815,870.21. Portland 76 further seeks recovery of expenses in the amount of $55,865.91. This amount includes the cost of making 142,944 photocopies at $.20 per copy, for a total of $28,588.80, and $8,058.34 expended on computer research. Included in the total expenses requested are the amount sought in the original petition, minus a reduction of copy expenses of some $3,533.20 plus the additional costs incurred after trial. Portland 76 also seeks recovery of expert fees in the amount of $39,436.69.

In determining the amount of attorney fees that should be awarded, the court begins by calculating the number of hours reasonably expended, and a reasonable hourly rate. Gates v. Deukmejian, 987 F.2d 1392, 1397 (9th Cir. 1992). Multiplying those figures yields a "lodestar" amount, which may then be increased or decreased. Id. at 1402. In determining the lodestar amount, the court considers the novelty and complexity of the issues presented, the special skill and experience of counsel, the quality of the representation, the results obtained, and any superior performance by counsel. D'Emanuele v. Montgomery Ward & Co., Inc., 904 F.2d 1379, 1383 (9th Cir. 1990). The court may reduce the number of hours factored into the lodestar if the party seeking fees provides inadequate documentation, if counsel have duplicated efforts or over-staffed the action, or if time was expended on separate, unsuccessful claims. Chalmers v. City of Los Angeles, 796 F.2d 1205, 1210 (9th Cir. 1986).

In determining the attorney fees that Portland 76 should recover here, I am satisfied that the rates per hour specified in plaintiff's original request for attorney fees are reasonable. I am convinced, however, that the use of two law firms, and the division of the litigation responsibilities among numerous attorneys, resulted in some duplication of efforts. There is no

way to determine the precise amount by which this allocation of effort increased Portland 76's attorney fees.[2] My review of the billing expenses submitted, however, convinces me that the overall total attorney costs through the time of trial should be slightly reduced to reflect the inevitable duplication of efforts resulting from the manner in which this action was staffed.

In addition to some general duplication of efforts, it is significant that plaintiff did not prevail on all of its claims. Instead, UNOCAL successfully defended against four of the six claims, including the PMPA claim, successfully limited plaintiff's claim for lost profits to the period ending on February 28, 1994, and obtained a judgment in the amount of $186,610.06 on its second counterclaim. Certainly, some of the claims upon which UNOCAL prevailed were closely related to the claims upon which Portland 76 was successful. Some of the claims and issues were not, however, sufficiently related to justify requiring UNOCAL to pay Portland 76's attorney fees incurred on unsuccessful claims. From the record submitted, I am unable to determine with precision the number of hours properly attributable to this category. Based upon my experience with the issues presented both before and during the trial, I conclude that at least 20% of the time Portland 76's counsel expended on this action through trial resulted from duplication of effort or was devoted to issues and claims that were not closely related to those on which plaintiff prevailed. Therefore, I will allow plaintiff to recover as attorney fees 80% of the $547,267.25 it requested in the original motion, plus the "unenhanced fees" of $66,169.00 incurred since the filing of the original petition. This yields a total of $503,982.80.

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[2] I note for the record that UNOCAL has submitted competent evidence supporting the conclusion that $300,000 to $350,000 would adequately compensate Portland 76 for the attorney fees reasonably incurred in this action.

I conclude that Portland 76 is not entitled to a multiplier here. Lodestar amounts should be increased in only exceptional cases. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986). Counsels' agreement to pursue this matter on a contingent fee basis does not justify a fee enhancement. See City of Burlington v. Dague, 112 S. Ct. 2638, 2643 (1992).[3] The complexity of this action is not a basis for enhancing the fees, because the difficulty of the issues is presumably reflected in the number of hours expended. Blum v. Stenson, 465 U.S. 886, 898 (1984). Plaintiff's characterization of this action as "undesirable" is unpersuasive. Plaintiff here is not "unattractive" as a client in the manner that the term is generally used in cases addressing the determination of reasonable attorney fees. See, e.g., Gomez v. Gates, 804 F. Supp. 69, 75 (C.D. Cal. 1992) (enhancement proper in cases, such as excessive force action brought by convict, that are "undesirable" because "plaintiff is unlikely to prevail for reasons having nothing to do with the merits of the claim or the quality of the attorney's performance").

Turning to the issue of expert fees, I note that these expenses are not generally allowed in this District. I find no basis to deviate from that general practice in this action, and consequently deny Portland 76's request to recover these fees.

I am satisfied that plaintiff has submitted adequate documentation of computer research costs, and will award the amount requested in the supplemental request.

Finally, I have concluded that the 142,944 photocopies for which plaintiff now seeks reimbursement is excessive, and that 100,000 at $.20 each should amply compensate plaintiff for photocopying costs. This conclusion is not based upon any

---

[3] Plaintiff's own expert has noted that, in light of Dague, it is probable that multipliers are no longer permitted in establishing reasonable attorney fees.

meticulous calculation, but simply reflects my belief that that number is sufficient, and that any possible underage is offset by the payment of a per-page cost that appears to be in excess of competitive rates. I am therefore deducting $8,588.80 from the amount of expenses Portland 76 may recover, and am awarding it expenses in the amount of $47,277.11.

CONCLUSION

Defendant UNOCAL's motion for judgment as a matter of law, for a new trial, or for remittitur (#290) is DENIED.

Plaintiff Portland 76 shall recover $14,815.49 of the costs requested in its Bill of Costs (#280).

Plaintiff Portland 76's motion to recover attorney fees and expenses (#276-1) is GRANTED in part and DENIED in part. The motion is GRANTED to the extent that Portland 76 shall recover attorney fees in the amount of $503,982.80, and expenses in the amount of $47,277.11, and DENIED as to the balance of the attorney fees and expenses requested.

DATED this 6th day of September, 1995.

/s/ John Jelderks
John Jelderks
United States Magistrate Judge

APPENDIX C

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Attorneys for Plaintiff Portland 76 Auto/Truck Plaza, Inc. and FRCP 13(h) Defendants Gordon Barron and Joan Barron

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND 76 AUTO/TRUCK PLAZA, INC.,	)	Civil No. 92-1635-JE
Plaintiff,	)	
v.	)	FINAL JUDGMENT
UNION OIL COMPANY OF CALIFORNIA, dba UNOCAL, NATIONAL AUTO/TRUCKSTOPS, INC.,	)	
Defendants,	)	

ER 16-22

APPENDIX D

v.	)
	)
GORDON A. BARRON, JR., and JOAN L. BARRON,	)
	)
Defendants.	)
	)

This action came on for trial before the Court and a jury, the Honorable John Jelderks, United States Magistrate Judge, presiding. The issues having been duly tried and a jury having duly rendered its verdict, now, therefore,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. That Plaintiff Portland 76 Auto/Truck Plaza, Inc., recover from Defendant Union Oil Company of California, dba Unocal, the sum of ONE MILLION DOLLARS ($1,000,000) on Plaintiff's Second Claim, for breach of contract, with post-judgment interest thereon compounded annually at the federal interest rate of six and twenty-eight hundredths percent (6.28%) per annum;

2. That Plaintiff Portland 76 Auto/Truck Plaza, Inc., recover from Defendant Union Oil Company of California, dba Unocal, the sum of Two Million Three Hundred Seven Thousand Four Hundred Forty Dollars, as trebled by law, for a total amount of SIX MILLION NINE HUNDRED TWENTY-TWO THOUSAND THREE HUNDRED TWENTY DOLLARS ($6,922,320), on Plaintiff's First Claim, for violation of the Robinson-Patman Act, with post-judgment interest thereon compounded annually at the federal interest rate of six and twenty-eight hundredths percent (6.28%) per annum;

3. That Plaintiff Portland 76 Auto/Truck Plaza, Inc.'s damages on its First Claim under the Robinson-Patman

Act encompass Plaintiff's damages on its Second Claim for breach of contract;

4. That Plaintiff Portland 76 Auto/Truck Plaza, Inc. recover from Defendant Union Oil Company of California, dba Unocal, its costs of suit, including reasonable attorney fees and expenses, on Plaintiff's First Claim for violation of the Robinson-Patman Act, with post-judgment interest thereon compounded annually at the federal interest rate of six and twenty-eight hundredths percent (6.28%) per annum;

5. That, pursuant to the Court's ruling on May 1, 1995, the Court directed judgment as a matter of law against claims for damages accruing after February 28, 1994 on plaintiff's Second Claim, for breach of contract, and on plaintiff's First Claim, for violation of the Robinson-Patman Act;

6. That, in accord with the Court's ruling on May 1, 1995, the Court directs judgment as a matter of law against Plaintiff Portland 76's Third Claim, for violation of the statutory requirement of good faith imposed by the Oregon Motor Fuel Franchises Act, and that claim is dismissed on the merits;

7. That, in accordance with this Court's summary judgment ruling on March 10, 1995, Plaintiff Portland 76's Fourth Claim, for violation of the Petroleum Marketing Practices Act, is dismissed on the merits as to both Unocal and National Auto/Truckstops, Inc.;

8. That, in light of the Court's ruling entered on October 11, 1994 granting summary judgment against that portion of Plaintiff Portland 76's Fifth Claim for declaratory judgment regarding the underground storage tanks, that portion of the Fifth Claim is dismissed; that portion of plaintiff's Fifth Claim for declaratory judgment regarding rent on the subject

property is included within the judgment granted to Unocal under paragraph 10 of this judgment; and that Plaintiff Portland 76 is awarded judgment on the remainder of the Fifth Claim, which sought declaratory relief granting a setoff of any amounts due to Unocal, the terms of which relief are reflected in the other terms of this Judgment;

9. That, in accord with the Court's ruling on April 20, 1995, the Court directs judgment as a matter of law against Plaintiff's Sixth claim, for violation of the Oregon Anti-Price Discrimination Act, and that claim is dismissed on the merits; and

10. That Defendant Union Oil Company of California, dba Unocal, recover from Plaintiff Portland 76 Auto/Truck Plaza, Inc., the sum of ONE HUNDRED EIGHTY-SIX THOUSAND SIX HUNDRED TEN AND 06/100 DOLLARS ($186,610.06) on its Second Counterclaim, for account stated, with prejudgment interest thereon compounded annually at the state interest rate of nine percent (9%) per annum from April 30, 1993 to the date of entry of this Final Judgment, and with post-judgment interest thereon compounded annually at the federal interest rate of six and twenty-eight hundredths percent (6.28%) per annum;

11. That Defendant Union Oil Company of California's, dba Unocal, damages on its Second Counterclaim are setoff against Plaintiff Portland 76 Auto/Truck Plaza, Inc.'s damages;

12. That Defendant Union Oil Company of California, dba Unocal ("Unocal"), take nothing on its First Counterclaim, which alleged that Plaintiff Portland 76 had brought a frivolous PMPA claim, which Counterclaim the Court finds is unsupported, and the Counterclaim by Unocal is dismissed on the merits;

13. That Defendant Unocal's Third Counterclaim, for foreclosure of personal property security interest against Portland 76, Gordon Barron, and Joan Barron, is dismissed as moot; provided, however, that, in the event that the judgment in favor of Plaintiff Portland 76 is taken away on appeal as to both Plaintiff's Second Claim, for breach of contract, and Plaintiff's First Claim, for violation of the Robinson-Patman Act, such that no amount is due by Unocal on those claims, or that the amount due plaintiff Portland 76 by Unocal on those claims is less than the amount due Unocal by plaintiff Portland 76 as provided in paragraph 10 of this judgment, then judgment shall enter in favor of Unocal on its Third Counterclaim, for foreclosure, in that the Court finds that there is sufficient evidence to support the relief requested;

14. That Defendant Unocal take nothing on its third-party claim Against Gordon and Joan Barron to enforce a guaranty, as that claim is moot; provided, however, that in the event that the judgment in favor of Plaintiff Portland 76 is taken away on appeal as to both Plaintiff's Second Claim, for breach of contract, and Plaintiff's First Claim, for violation of the Robinson-Patman Act, such that no amount is due plaintiff by Unocal on those claims of that the amount due Portland 76 by Unocal on those claims is less than the amount due Unocal by plaintiff Portland 76 as provided in paragraph 10 of this judgment, then judgment shall enter in favor of Unocal on its third-party claim against Gordon Barron and Joan Barron, and each of them, for the amount so determined, in that the Court finds that there is sufficient evidence to support relief.

SUMMARY OF NET FINAL JUDGMENT AGAINST UNOCAL

Plaintiff Portland 76 Auto/Truck Plaza, Inc. shall take judgment against defendant Union Oil Company of California, dba Unocal, as follows:

1.	Judgment Creditor:	Portland 76 Auto/Truck Plaza, Inc.
2.	Judgment Creditor's Attorneys:	Ball Janik & Novack, Farleigh Wada & Witt
3.	Amount of Judgment:	Damages of SIX MILLION SIX HUNDRED NINETY-NINE THOUSAND SIX HUNDRED SEVENTY-ONE DOLLARS ($6,699,671.00), plus reasonable attorneys fees and costs to be set by the Court in the amount of $_____ with interest accruing on the total of damages, fees, and costs as indicated in paragraph 5 below
4.	Interest Owed to Date of Judgment:	None
5.	Interest Owed from The Date of Entry of the Judgment:	Six and twenty-eight hundredths percent (6.28%) per annum,

compounded annually

DATED at Portland, Oregon, this 22 day of May, 1995.

/s/ John Jelderks
The Honorable John Jelderks
United States Magistrate Judge

Presented By:

BALL, JANIK & NOVACK

By: /s/ Phillip E. Joseph #88237 for
Bruce M. Hall, OSB #54038
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Attorneys for Plaintiff

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND 76 AUTO/TRUCK PLAZA, INC.,	)
	) Civil No.
	) 92-1635-JE
Plaintiff,	)
	) VERDICT
v.	)
	)
UNION OIL COMPANY OF CALIFORNIA, dba UNOCAL,	)
	)
Defendant.	)

We, the jury, being duly impaneled and sworn to try the issues in this case, do find as follows:

1. Did UNOCAL breach its lease with Portland 76?

Answer: YES (yes or no)

If your answer to question no. 1 is no, skip to question no. 4.

If your answer to question no. 1 is yes, proceed to question no. 2.

2. Did UNOCAL's breach of lease cause monetary damages to Portland 76?

Answer: YES (yes or no)

APPENDIX E

If your answer to question no. 2 is no, skip to question no. 4.

If your answer to question no. 2 is yes, proceed to question no. 3.

3. What is the amount of money damages caused prior to February 28, 1994, by UNOCAL's breach of lease.

Answer: $ 1,000,000 (1 MILLION)

4. Did Unocal violate the Robinson-Patman Act in connection with the furnishing of facilities to Portland 76.

Answer: YES (yes or no)

If your answer to question no. 4 is no, do not answer any further questions. Your presiding juror should sign this verdict form.

If your answer to question no. 4 is yes, proceed to question no. 5.

5. Did UNOCAL's violation of the Robinson-Patman Act cause monetary damages to Portland 76?

Answer: YES (yes or no)

If your answer to question no. 5 is no, do not answer any further questions. Your presiding juror should sign this verdict form.

If your answer to question no. 5 is yes, proceed to question no. 6.

6. What is the amount of money damages caused prior to February 28, 1994, by violation of the Robinson-Patman Act?

Damages, if any, which are already included in question no. 3 above:	$ 1,000,000
Damages not already included on question no. 3 above:	$ 1,307,440
Total Robinson-Patman Damages:	$(2,307,440)

Your presiding juror should sign this verdict form and signal the bailiff to indicate you have reached a verdict.

DATED this 2nd day of May, 1995.

/s/ Dale Furness
Presiding Juror

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

CIVIL MINUTES

Case No.: CV 92-1635-JE	Proceeding Date: April 25, 1995
Case Title: PORTLAND 76 v. UNOCAL, et al.	
Presiding Judge: John Jelderks	**Courtroom Deputy:** Michele Straughan
Reporter: Dennis Grube	**Tape No.:**

PLAINTIFFS' COUNSEL	DEFENDANTS' COUNSEL
(1) BRUCE HALL	(1) MICHAEL WILLIAMS
(2) BRAD STANFORD	(2) MICHAEL THOMAS
(3) JOHN DUNBAR	(3) JERRY HODSON
(4)	(4)

NOTIFICATION:

Docket Entry:

Record of day 7, jury trial:

Plaintiff rests.

ORDER - Plaintiff's (oral) motion to reinstate claim under Oregon Anti-price Discrimination Claim is DENIED.

ORDER - Plaintiff's (oral) motion to amend the complaint to assert a claim for tortious breach of the covenant of good faith/fair dealing is DENIED.

ORDER - Defendant's motion to strike claims set forth in paragraphs 1-7, 9 & 18 of the pretrial order is GRANTED. (#202)

ORDER - Defendant's motion for judgment as a matter of law on plaintiff's claim for breach of the statutory requirement set forth at ORS 650.245 is GRANTED, except to the extent that this claim is co-extensive with plaintiff's breach of contract claim.

ORDER - Defendant's (oral) motion to strike plaintiff's claim for future damages/losses based upon going concern value is DENIED.

ORDER - Defendant's (oral) motions for judgment as matter of law on plaintiff's Robinson Patman law are DENIED.

Witness sworn and testimony adduced.

ORDER - court is in recess until 8:30 a.m. on April 26, 1995.

Document Number: 244
CIVIL MINUTES

Revised April 28, 1995 ER 14 Honorable John Jelderks

Jury Instructions

* * *

THE COURT: Ladies and gentlemen of the jury, I'll ask Mr. Collier to hand you copies of your instructions, and then if you wish to, you can read along with me. I'm going to read them to you, even though you have them. You'll have these copies in the jury room and can refer back to the instructions if you wish.

Members of the jury, you have now heard all the evidence in this case and it is now your duty to decide the facts and reach your decision.

I will tell you the law which you must follow in reaching your decision. Although you may think the law is or should be different, you are bound by your oath to apply the law that I give to you.

Your decision must be based solely on the evidence. Do not allow bias, prejudice or sympathy to influence you. The evidence consists of the testimony of the witnesses, the exhibits you will have in the jury room, and the facts to which the parties have agreed.

As I have earlier advised you, the comments of the attorneys are not evidence. If your recollection of the evidence differs from that of the attorneys, rely upon your own memory.

You are the judges of whether the witnesses were telling the truth when they testified. You must presume that each witness told the truth, but you are free to decide otherwise, based on the manner in which the witness testified, the motive or bias of the witness, or if there was different evidence which you believe. If you find that a witness intentionally lied in one part

of his or her testimony, you are free to disregard anything else that witness said.

You are the judges of how much weight a witness' testimony deserves. In considering testimony, you are permitted to form reasonable conclusions by using our own good common sense. You should not decide a fact merely by counting the number of witnesses or exhibits. The testimony of one witness whom you believe is enough to prove any fact in dispute.

Experts may give opinions on those subjects in which they have special skills, knowledge, experience, training or education. You should consider each expert opinion in evidence and give it whatever weight it deserves. Remember, you decide all the facts. If, in reaching an opinion, you find that an expert relied on certain facts, and you decide that any of those facts were not true, then you're free to disregard the opinion.

The plaintiff, Portland 76, must prove its claims by a preponderance of the evidence. "Preponderance of the evidence" means the greater weight of evidence. It is such evidence that when weighed with that opposed to it has more convincing force and is more probably true and accurate. If upon any question in the case the evidence appears to be equally balanced or if you cannot say upon which side it weighs more heavily, you must resolve that question against the plaintiff.

You've heard testimony about Unocal's counterclaim against Portland 76 for unpaid rent and fuel expenses and about Gordon and Joan Barron's alleged liability for these expenses based upon the guarantees they had signed. I have determined that these issues raise no questions for you to decide. Therefore, it is not necessary to instruct you about Unocal's counterclaims or about the guarantees.

APPENDIX G

The only remaining claims for you to decide are Portland 76's claims against Unocal for alleged violations of the Robinson-Patman Act and alleged breach of the parties' lease agreement. I will now explain these claims.

The Robinson-Patman claim. Portland 76 alleges that it was damaged as a result of a violation of the Robinson-Patman Act by Unocal. Under the portion of that act at issue here, it is unlawful for any person or corporation to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by furnishing facilities connected with a sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Congress enacted the Robinson-Patman Act in order to prevent distortion of competition among favored and disfavored competitors. The portion of the act at issue here is intended to prevent one furnishing commodities for resale from engaging in disguised forms of price discrimination in furnishing those commodities to its customers.

To prevail on Portland 76's claims for violation of the Robinson-Patman Act, Portland 76 must prove each of the following elements:

First, Portland 76 must establish Unocal discriminated against it in favor of at least one other Unocal-franchised truckstop through Unocal's furnishing of any facilities connected with the resale of fuel to customers.

To establish that Unocal discriminated against it in violation of the Robinson-Patman Act, Portland 76 must prove that Unocal did not furnish it facilities connected with the sale of a commodity on terms proportionally equal to the terms upon

which Unocal furnished those facilities to at least one other Unocal truckstop that competed directly with Portland 76.

The law does not give a precise definition of "proportionally equal terms." I instruct you, however, that there is no single standard for determining whether terms under which a facility are provided are proportionally equal. Absolute equality is not required.

You may consider the value to Unocal in providing facilities to various franchisees in determining whether it provided those facilities on proportionally equal terms. This means that in deciding what investment to make in the facilities it provided to its franchisees, Unocal could consider such things as the value of the facilities, the rented it charge for those facilities, the return that it might expect to realize on the investment, and the relative volume of business and potential volume of business of the franchisees.

Second, Portland 76 must establish that it was in direct competition with the other favored Unocal franchise truckstop or truckstops. Any such competition must be real and economically significant, not theoretical or insubstantial.

Third, Portland 76 must establish that it suffered injury to its business as a result of Unocal's discrimination.

And fourth, Portland 76 must establish that this injury resulted in damages to it in an amount which can be reasonably estimated based on the evidence.

If Portland 76 has established the above elements, it is entitled to judgment in its favor on the Robinson-Patman claims.

Under the Robinson-Patman Act, Portland 76 was in competition with another Unocal-franchised truckstop if

Portland 76 and the other Unocal truckstop were located in the same geographic market. In other words, franchisees are in competition with each other if they compete for a significant number of the same customers and those customer dollars.

In determining whether Portland 76 competed with another franchised truck Unocal truckstop, you may consider factors such as: The distances traveling between refueling by long-haul trucks; the particular truckstop's advertising and other merchandising efforts; any significant shift of customers between Portland 76 and another Unocal-franchised truckstop based on the quality of the facilities; and any other evidence which would show whether significant competition existed.

If you find that Unocal violated the federal Robinson-Patman Act, you must next determine the amount of damages to which Portland 76 is entitled. Under the Robinson-Patman Act, if damages are awarded they must be measured by the actual loss to Portland 76 and not by what another favored Unocal truckstop or truckstops gained. Robinson-Patman Act damages may not be measured by determining the monetary amount or equivalence of the facilities provided to another favored Unocal-franchised truckstop or truckstops.

If you find that Unocal violate the Robinson-Patman Act, you should award the Portland 76 the value of the profits it lost, if any, as a result of that violation. Although you've heard evidence regarding lost franchise value or loss of going concern value, I have concluded that you are not to consider that evidence because it involves potential damages which extend beyond the term of the lease. Likewise, you are not to consider any alleged lost profits for calendar year 1994 which extends beyond February 28th.

Any damages awarded must be reasonable and be supported by a preponderance of the evidence. If you award

damages, you should make a just and reasonable estimate based on the relevant evidence.

* * *

APPENDIX G

UNITED STATES CODE
TITLE 15
Commerce and Trade

§ 13. Discrimination in price, services, or facilities

(a) Price; selection of customers

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in

quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Burden of rebutting prima-facie case of discrimination

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) Payment or acceptance of commission, brokerage, or other compensation.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other

compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) Payment for services or facilities for processing or sale

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) Furnishing services or facilities for processing, handling, etc.

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) Knowingly inducing or receiving discriminatory price

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

(Oct. 15, 1914, c. 323, §2, 38 Stat. 730; June 19, 1936, c. 592, §1, 49 Stat. 1526.)

APPENDIX H

Supreme Court, U.S.
FILED
MAR 19 1999
OFFICE OF THE CLERK

No. 98-1076

In The

Supreme Court of the United States

October Term, 1998

PORTLAND 76 AUTO/TRUCK PLAZA, INC.,

Petitioner,

v.

UNION OIL COMPANY OF CALIFORNIA,
dba UNOCAL, NATIONAL AUTO/TRUCKSTOPS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Union Oil Company of California, dba Unocal
**Counsel of Record for Respondent*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

QUESTION PRESENTED

Section 2(e) of the Robinson-Patman Act makes it unlawful for the seller of a commodity for resale to discriminate in favor of one purchaser against another purchaser by furnishing "facilities connected with" the resale on disproportional terms. The question presented is whether realty leased to a purchaser of a commodity for resale, by the party that sells the commodity to that purchaser, is "facilities connected with" the resale in the sense of the Robinson-Patman Act.

LIST OF PARTIES AND AFFILIATES

Petitioner's list of parties and affiliates is accurate. Pursuant to Supreme Court Rule 29.6, Union Oil Company of California declares that it is a wholly owned subsidiary of Unocal Corporation, whose stock is publicly traded on the New York Stock Exchange. Union Oil Company of California has no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e), makes it unlawful for a seller of a commodity for resale to discriminate in favor of one purchaser against another purchaser ~~by~~ furnishing "facilities connected with" the resale on disproportional terms. Petitioner ("Portland 76") sued respondent ("Unocal") in the District of Oregon, alleging that it lost profits as a result of Unocal's violation of section 2(e). The petition, however, describes neither the case tried in the district court nor the one decided in the court of appeals.

Unocal, which sold diesel fuel to truckstop operators for resale, owned the truckstops and leased them to franchisees, including Portland 76, throughout the West and elsewhere. But Portland 76 did not allege that it lost profits because Unocal provided facilities *at* the truckstops on disproportional terms, as the petition continually implies. *See, e.g.*, Pet. 3, 6, 9, 16-17. To the contrary, Portland 76 alleged that Unocal leased *the* truckstops, *entire* truckstops, to Portland 76 and three other Unocal franchisees on disproportional terms.

Portland 76 operated the Unocal truckstop in Aurora, Oregon, and it alleged that Unocal "fail[ed] to carry out renovations for [Portland 76], while providing them for [Portland 76's] competitors" in Redding, Sacramento, and Santa Nella, California. Beginning with its first complaint and continuing through six amendments, Portland 76 anchored its case on the allegation that Unocal violated section 2(e) because it "failed and refused to renovate and upgrade [Portland 76's] facility," not that Unocal failed to

provide facilities *at* the truckstop on proportional terms, which is the petition's theme. *See, e.g.*, Pet. 6, 7, 10-11.

The magistrate judge did not, as the petition asserts, consider whether facilities at the truckstop could be "facilities" under section 2(e). Pet. 6. That was never an issue. At trial, Portland 76 undertook to prove that Unocal spent more, dollar for dollar, on renovation and improvements at the truckstops in California than at the one in Aurora, and argued that it was entitled to the same. This prompted the magistrate judge to remark that "it does not make sense for someone who rents a Chevrolet to demand a Cadillac," App. 7, but when Unocal moved for judgment as a matter of law, Fed. R. Civ. Pro. 50(a), (b), he stuck to his pretrial ruling that the "truck stop at issue here" – not the facilities *at* the truckstop – appears to be "a 'facility' as that term is generally understood."

Following the denial of Unocal's motion for judgment as a matter of law, the jury returned their substantial verdict and Unocal took its appeal to the Ninth Circuit Court of Appeals. Contrary to the petition's report, Pet. 7, the court of appeals, like the trial court, did not consider whether facilities at the truckstop were "facilities" under the Robinson-Patman Act. Again, that was not an issue. The issue, as framed by the court, App. 5, was "whether the Robinson-Patman Price Discrimination Act applies to the truck stop as a 'facility,' " the same as it had been in the district court. The court of appeals pointed out, correctly, that Portland 76 "won its verdict on the theory that it does . . . . " *Id.*

The Ninth Circuit reversed. The court observed that the word "facilities," read literally and in isolation, could describe a truckstop, "as Portland 76 successfully claimed in district court." App. 6. But "because the language is extremely general and subject to different constructions," *id.*, the court looked to Robinson-Patman's legislative history, App. 10-12, and to the Act's "long established administrative interpretation by the Federal Trade Commission," App. 13-15, for evidence of Congressional intent. The court also looked for guidance to the decisions of this Court and others in deciding whether the lease of a truckstop by the seller of diesel fuel is a "facility" within the meaning of section 2(e), App. 8-10, concluding that it is not. "[R]ealty leased to a purchaser of goods for resale," the court wrote, "by the party that sells the goods to that purchaser, is not 'facilities connected with' the sale in the sense of the Robinson-Patman Act." App. 17.

Portland 76 petitions this Court for a writ of certiorari, which should be denied.

REASONS FOR DENYING THE WRIT

The petition, every component of it, is built on a case not tried in the district court, not decided in the court of appeals. As a consequence, the petition's "Questions Presented" are not, and the significance of the case described in the petition is not the case before the Court today. Contrary to the petition's assertions, there is no conflict between the opinion in this case and any other. Nothing in the petition discloses a compelling reason to grant it.

A. The Case Described In The Petition Is Not The Case Before The Court Today.

The petition describes the circuit court's holding as follows:

- "The Ninth Circuit Court of Appeals . . . concluded that the Robinson-Patman Act's ban on the discriminatory provision of 'facilities' did not apply to 'facilities' provided on leased property . . . . " Pet. 3.

- "The Ninth Circuit [held] that the truckstop facilities were not 'facilities' under the Robinson-Patman Act." Pet. 6.

- The "Ninth Circuit believed that 'facilities' at the truckstop were not 'facilities' under the Robinson-Patman Act." Pet. 7.

- The "Ninth Circuit . . . concluded that 'facilities' on leased property were not 'facilities' under the statute." Pet. 9.

From these descriptions of the holding, the petition argues that the opinion "creates a judicially made exception to the statute," Pet. 7 – the "leased property exception," Pet. 11 – and that the court's decision will enable franchisors to "evade the Robinson-Patman Act simply by linking the provision of facilities to a lease agreement." Pet. 7, 25. According to the petition, Pet. 17, handbills, cabinets, and displays – items that everyone agrees may be "facilities" – are not, if they are provided by a franchisor that leases the property on which the franchisee is located. According to the petition, Pet. 26, the circuit court's opinion gives franchisors a free pass.

Whatever the effects of the purported holding described in the petition, they are not the effects of the holding in the circuit court. The holding described in the petition is not the holding in *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Company of California*. The circuit court in *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Company of California* did not hold that "facilities" on leased premises are not "facilities" within the meaning of section 2(e). The circuit court held that "realty leased to a purchaser of goods for resale, by the party that sells the goods to that purchaser, is not 'facilities connected with' the sale in the sense of the Robinson-Patman Act." App. 17.

The difference is significant. The opinion addresses whether leased real estate can be a section 2(e) "facility." The petition addresses whether "facilities" on leased premises can qualify. Under the opinion, there is no "leased property exception" of the sort that informs the petition. Under the opinion, and contrary to the petition, franchisors are not exempt from section 2(e). Under the opinion, handbills, cabinets, and displays located on leased property can still qualify as "facilities" under section 2(e), the same as they could be before.

B. The Ninth Circuit's Opinion Does Not Depart From Established Jurisprudence Nor Does It Conflict With The Law Of Any Other Circuit.

The petition argues that the opinion "has no basis in this Court's jurisprudence or the legislative history," Pet. 7, and accuses the circuit court of abdicating its responsibility to the law and following poorly reasoned decisions from the Fourth and Sixth Circuits, ostensibly to

avoid intercircuit conflict. Pet. 12-15. According to the petition, Pet. 19-25, the result is an opinion that conflicts with this Court's decisions, with those of other circuits, and with an earlier Robinson-Patman case from the Ninth Circuit as well. These charges, like the others, are infected by the petition's refusal to acknowledge the case that was tried and appealed. None withstands scrutiny. All are wrong.

1. The Circuit Court's Opinion Is Faithful To The Law. It Requires No Defense.

Section 2 of the Clayton Act made it unlawful for suppliers of goods to engage in direct price discrimination. 38 Stat. 730 (1914). To get around this prohibition, "large chain buyers" exerted "their enormous purchasing power" to exact price concessions disguised as advertising allowances or "special services or facilities" or rebates for "brokerage fees." *F. T. C. v. Simplicity Pattern Co.*, 360 U.S. 55, 60 (1959). As the circuit court pointed out, App. 12, section 2(e) attacked these secret discriminations disguised as advertising and promotional discounts to the chainstores. *Simplicity Pattern*, 360 U.S. at 69 n. 12. Section 2(e) made it unlawful for sellers of commodities to discriminate in furnishing "services or facilities connected with" their resale.

"[P]recision of expression is not an outstanding attribute of the Robinson-Patman Act," however, *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 65 (1952), and section 2(e), like so much of Robinson-Patman, is exquisitely ambiguous. The petition argues that it is not, Pet. 7-10, but the circuit court's opinion demonstrates

convincingly that it is, App. 5-10, and there is no need to demonstrate the point again here.

Once one recognizes that section 2(e) is open to interpretation, the circuit court's analysis, far from having "no basis in this Court's jurisprudence or the legislative history of the statute," Pet. 7, is firmly grounded in both. Had the court held that "facilities on *leased* property somehow are excluded from the ambit of section 2(e)," as the petition asserts, Pet. 12, a defense of the opinion might be required. But the court held that "realty leased to a purchaser of goods for resale, by the party that sells the goods to that purchaser, is not 'facilities connected with' the sale in the sense of the Robinson-Patman Act," App. 17, an entirely different matter – and nothing further need be said.

It is unfair, nonetheless, to argue, as the petition does, Pet. 14, that the court abdicated its responsibility to the law to "follow two opinions that it explicitly recognized as being devoid of compelling reasoning in order to *avoid* a conflict between the circuits." It is unfair to argue, as the petition does, *id.*, that the opinion thus "avoids a reasoned consideration of the issue presented in the case." That plainly is not so.

The court in *Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 380 (4th Cir. 1992), *cert. denied*, 506 U.S. 1041 (1992), held that "real estate leases . . . are not within the scope of Robinson-Patman Act section 2(e)." The court in *Export Liquor Sales, Inc. v. Ammex Warehouse Co.*, 426 F.2d 251, 252 (6th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971), held that the "Act is not concerned with what we have here[,] a lease of realty." The results there mirror the result here,

but the Ninth Circuit did not blindly "follow those opinions." Pet. 14. One need only read the opinion in this case to know that this is so. The circuit court merely took note of the decisions from its sister circuits and commented that it "shall not lightly create an intercircuit conflict affecting commerce nationally," App. 10 – which it did not.

2. The Circuit Court's Opinion Does Not Conflict With Any Other.

Certainly the circuit court's opinion does not conflict with its own earlier opinion in *Standard Oil Co. of Cal. v. Perkins*, 396 F.2d 809 (9th Cir. 1968), *rev'd*, 395 U.S. 642 (1969). Certainly it does not conflict with the Second Circuit's opinion in *Haug v. Rolls Royce Motor Cars*, 148 F.3d 136 (2d Cir. 1998).

More than 75 years ago, in *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923), this Court wrote that the writ of certiorari is reserved for "real and embarrassing conflict of opinion and authority between the circuit courts of appeals." The supposed conflict between the opinions in this case and *Haug* is neither real nor embarrassing. It does not exist.

Haug was an authorized Rolls Royce parts and service provider. It alleged that Rolls discriminated in favor of its competitor, Carriage House, which was both an authorized Rolls parts and service provider and an authorized Rolls dealer as well. The district court dismissed

Haug's section 2(d)[1] and 2(e) complaint against Rolls "on the grounds that Haug is not 'functionally equivalent' to Carriage House," as required. *Haug*, 148 F.3d at 145. That was the issue on appeal – whether Haug and Carriage House were "functionally equivalent" – and the Second Circuit reversed. In *dictum*, however, the court observed:

> Haug's amended complaint alleged that Rolls Royce "[p]aid or caused to be paid through affiliates of [Rolls Royce] the rent for Carriage House of approximately . . . $60,000 to $90,000 per month, but did not pay such costs to plaintiffs[.]" . . . These payments are best construed as allegations of Section 2(d).

Id. That *dictum*, which the petition fastens onto, hardly presents a "real and embarrassing conflict of opinion and authority between the circuit courts of appeals." *Layne & Bowler Corp.*, 261 U.S. at 393.

In any case, *Haug*'s musings about section 2(d) of the Act have no bearing here. Under 2(d), it is unlawful for

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[1] Section 2(d) provides:

> (d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities. 15 U.S.C. § 13(d)

the seller of a commodity to make discriminatory payments in exchange for "facilities" furnished *by* the purchaser. Thus, *Haug* could not have held that realty leased to the purchaser constitutes "facilities" under Robinson-Patman. For that reason, too, *Haug* presents no conflict.

Neither does the Ninth Circuit's earlier opinion in *Perkins*. The court there held that, to the extent Perkins was a station operator rather than a wholesaler, "Standard was obliged," under sections 2(d) and (e), "to make the same proportional payments and allowances to Perkins for such items as service station rest room maintenance, painting of service stations, advertising and credit card privileges, as it did to the Branded Dealers." 396 F.2d at 814. The *Perkins* court did not consider whether an entire service station was a Robinson-Patman "facility" and, as the circuit court concluded here, any suggestion that painting of service stations and restroom maintenance constitute "services or facilities" was plainly *dicta*, App. 9, which is not the stuff of a writ of certiorari.

3. The Circuit Court's Opinion Correctly Applied Established Principles Of Statutory Construction.

The petition is not credible in its assertion that the circuit court's opinion "conflict[s] in principle with this Court's instructions regarding interpretation of terms contained in the Robinson-Patman Act." Pet. 21. It is not credible in its assertion that the Ninth Circuit's "approach in this case in narrowly interpreting the word 'facilities' also is contrary to the approach taken by its sister circuits in interpreting and applying that same word." Pet. 22.

The Ninth Circuit declined Portland 76's invitation to construe the statutory phrase expansively in this case:

> In sum, we have a word, "facilities," in the statute, that might be read to include leased realty or not. The dictionary definitions suggest inclusion, but the historical context, constructions by other circuits, and the administrative construction, all indicate that something narrower is intended.

App. 15. In doing so, however, the court did not ignore this Court's "instructions" that "the undefined terms in the Act need to be interpreted broadly." Pet. 21. To the contrary, the court applied well-established principles of statutory construction to ascertain and give effect to Congressional intent. *See Jefferson County Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 170 (1983) (" 'Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress' ").

Here, as in *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 197 (1974), where this Court construed the "in commerce" requirement of the Act, the "question . . . is how far Congress intended to extend its mandate under the . . . Robinson-Patman Act[ ]." Here, as there, the "answer depends on the statutory language, read in light of its purposes and legislative history[,]" *id.*, not on adjectives like "narrow" and "broad." The goal here was not to construe language narrowly, as the petition implies. The goal here, as in all Robinson-Patman cases, was to construe the Act in a way that "most nearly accommodates" the reasoning of judges and legislators. *Automatic Canteen*

Co., 346 U.S. at 78-79 (declining to give literal reading to language in the Act).

"Broad" is not Robinson-Patman litmus. To the contrary, this Court has twice "warned against interpretations of the Robinson-Patman Act which 'extend beyond the prohibitions of the Act,' " *Great Atlantic & Pacific Tea Co. v. F.T.C.*, 440 U.S. 69, 80 (1979); *Automatic Canteen Co.*, 346 U.S. at 63, and the Ninth Circuit took heed of that warning here. In doing so, the court did not adopt an analysis "contrary to the approach taken by its sister circuits," Pet. 22, because no circuit has given the statute the "broad" construction claimed. Every circuit has construed section 2(e) as the Ninth Circuit did here, to effectuate Congressional intent. *See, e.g., L&L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113, 1118 (5th Cir. 1982) ("delivery is not a service or facility within § 2(e)"); *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1328 (6th Cir. 1983) (credit programs and freight allowances fall outside of section 2(d) and (e)); *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1424 (11th Cir. 1990) ("financing programs do not relate to the resale of the supplier's goods and therefore are not services and facilities within the meaning of sections 2(d) and (e)").

The circuit court's opinion does not conflict in principle, or in any other respect, with this Court's instructions concerning statutory construction. It follows them. The circuit court's approach to statutory construction is consistent with, not contrary to, the approach taken by its sister circuits. There is no conflict here.

CONCLUSION

The petition discloses no compelling reason to grant it. It should therefore be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 98-1076

In The

Supreme Court of the United States

October Term, 1998

PORTLAND 76 AUTO/TRUCK PLAZA, INC.,

Petitioner,

v.

UNION OIL COMPANY OF CALIFORNIA, dba UNOCAL,
NATIONAL AUTO/TRUCKSTOPS, INC.

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

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March 29, 1999

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STATUTES

15 U.S.C. § 13(e) (Section 2(e) of the Robinson-Patman
Act) ..... *passim*

REASONS FOR GRANTING THE WRIT

Portland 76 seeks review of the Ninth Circuit's holding that "facilities" designed to promote the resale of a commodity, when located on leased property, are not "facilities" as that word is used in section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e). A three judge panel of the Ninth Circuit concluded that section 2(e) of the Robinson-Patman Act contains a non-textual "leased property" exception. From that premise, the panel held the facilities at a leased truckstop designed to promote the resale of fuel are not "facilities" under section 2(e).

As demonstrated in Portland 76's petition, the Ninth Circuit's analysis in this case is flawed in numerous respects. By creating a judicially made, non-textual exception to section 2(e), the Ninth Circuit ignored the plain meaning of the Robinson-Patman Act. In reaching its conclusion, the Ninth Circuit disregarded the legislative history of the Act and misapplied regulations promulgated by the Federal Trade Commission.[1] The Ninth Circuit's analysis creates a conflict in principle with its own case law as well as with case law from other circuits. Finally, the Ninth Circuit's opinion, if permitted to stand, will allow any franchisor with basic drafting skills to evade altogether the Robinson-Patman Act.

In its response to Portland 76's petition, Unocal obfuscates the arguments raised in Portland 76's petition. In an apparent attempt to distract this Court from the issues presented by Portland 76's petition, Unocal simply miscasts the facts and

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[1] The Federal Trade Commission ("FTC") is the federal agency primarily responsible for enforcement of the Robinson-Patman Act. The FTC never has applied (or encountered) the "leased property" exception as a defense to FTC complaints based on discrimination. In considering whether to grant the writ, this Court may want to invite comment from the FTC regarding the Ninth Circuit's creation of the "leased property" exception.

the case that were presented to the jury. From that misstatement of the case, Unocal attempts to defend the Ninth Circuit's opinion. Unocal's recitation of the case, and the arguments it presents for denying the writ, are misplaced.

A. The Jury Concluded that Unocal Had Discriminated in the Distribution of "Facilities" Under the Terms of the Fuel Resale Agreement.

The facts in this case are not legitimately in dispute. Unocal and Portland 76 entered into two separate agreements. The first agreement was for the resale of fuel; the second agreement was for the lease of a truckstop. Portland 76 argued to the jury, and on appeal, that under the fuel resale agreement, Unocal had discriminated in the provision of promotional facilities at the truckstop. Unocal does not claim that it discriminatorily provided those facilities because of its obligations under the truckstop lease. Unocal does not contest that the improvements at issue were provided to promote fuel sales, placing them squarely within section 2(e). Nevertheless, Unocal argues that it was permitted to discriminate in its provision of promotional facilities under the fuel resale agreement because those facilities were located on leased property.

Unocal now contends that at trial Portland 76 argued only that Unocal had discriminated in its provision of the truckstop as a single entity. Unocal inaccurately asserts that neither judge nor jury "consider[ed] whether facilities at the truckstop could be 'facilities' under section 2(e)." Response at 2. See also Response at 4-5 (reiterating the same argument). That argument is untrue. At trial, Portland 76 presented detailed comparisons regarding the expenditures that Unocal had made to the individual facilities at the Portland 76 truckstop, in contrast to the expenditures made by Unocal on facilities at other

truckstops. Even the Ninth Circuit recognized that there was evidence showing discrimination in the provision of specific truckstop facilities.

> "The jury heard that the truckstop's highway signs needed to be replaced, the roof leaked in the restaurant, the showers were in bad condition, the heating and air conditioning in the restaurant were inadequate, the parking lot was full of potholes, the sewage system stank on hot days, and the fuel lanes were too narrow."

App. 4. The jury was instructed at least nine times to consider whether Unocal had discriminated against Portland 76 in the furnishing of "facilities." App. 47-49. In the form of verdict, the jury concluded that Unocal did "violate the Robinson-Patman Act in connection with the furnishing of facilities to Portland 76." App. 41.

The case decided by the jury was about whether Unocal discriminated against Portland 76 in the provision of truckstop *facilities*. As Portland 76 made clear in its petition, one of the many analytical flaws in the Ninth Circuit's opinion involved the linguistic gymnastics undertaken by that court in order "to convert the *facilities* at the truckstop into the truckstop itself." Petition at 10-11. It its response, Unocal depends on the Ninth Circuit's error to support its position. Response at 5. Without that error, Unocal has little on which to rely.

B. Unocal Asks This Court to Ignore the Plain Meaning and Legislative History of Section 2(e) of the Robinson-Patman Act.

As demonstrated in Portland 76's petition, the Ninth Circuit ignored the plan meaning of section 2(e). Petition at 10-18. Unocal baldly asserts that the Ninth Circuit's interpretation

of the Section 2(e) is so patently and clearly correct "that nothing further need be said." Response at 7. However, even the Ninth Circuit explicitly recognized that the statutory interpretation issues presented by this case are "especially difficult." App. 2.

Unocal apparently acknowledges that in interpreting section 2(e), a reviewing court should look at both the language of the statute and the legislative history surrounding the passage of that statute. Response at 10-11. Yet, Unocal simply ignores the fact that the plain meaning of the word "facilities" clearly includes the promotional facilities at the truckstop. See Petition at 9-12; App. 6. Unocal also ignores the fact that section 2(e) applies to all "purchasers" of commodities, not just those purchasers who own the land on which they resell commodities. Moreover, Unocal (like the Ninth Circuit) altogether fails to cite any legislative history surrounding the passage of the statute that supports the argument that Congress intended to exclude facilities on leased property from the protections enacted in section 2(e).

In defense of the Ninth Circuit's opinion, Unocal mistakenly embraces the Ninth Circuit's reliance on Hinkleman v. Shell Oil Co., 962 F.2d 372 (CA 4 1992), cert. denied, 506 U.S. 1041 (1992) and Export Liquor Sales, Inc. v. Ammex Warehouse Co., 426 F.2d 251 (CA 6 1970) cert. denied, 400 U.S. 1000 (1971). Response at 7-8. Even the Ninth Circuit questioned the analytical value of those opinions. App. 9-10. Unocal does not contend that the analyses underlying those two cases are correct; rather, Unocal simply asserts that the "results there mirror the result here." Response at 7. That is an insufficient reason to permit a flawed opinion to stand.

C. *Unocal Overlooks the Inter and Intra-Circuit Conflicts in Principle That Arise as a Result of the Ninth Circuit's Opinion.*

In its petition, Portland 76 illustrated how the Ninth Circuit's opinion created various conflicts *in principle* with this Court's and other circuit court's reading of the text and legislative history of the Robinson-Patman Act. Petition at 19-25. Unocal argues that, because there is no explicit conflict between the holding in this case and the holdings from this Court and the other circuits regarding the interpretation of the word "facilities" in section 2(e) of the Robinson-Patman Act, there is no conflict in principle. See Response at 8-9, (citing Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923)). In so arguing, Unocal misstates Portland 76's argument.

Portland 76 recognizes that this Court never has decided whether "facilities" on leased property are "facilities" within the meaning of section 2(e). What Portland 76 argued in its petition, and reiterates here, is twofold. First, this Court has stated that non-textual limitations should not be added to provisions of the Robinson-Patman Act. Second, other circuit courts have applied an analytical construct in interpreting provisions of the Robinson-Patman Act that, if followed by the Ninth Circuit here, would have led to a different conclusion. Petition at 19-25.

Unocal also improperly criticizes Portland 76 for citing in its petition George Haug Co., Inc. v. Rolls Royce Motor Cars Inc., 148 F.3d 136 (CA 2 1998). Portland 76 discussed Haug in its petition to show that the Second Circuit recently treated leased premises as "facilities" for purposes of section 2(d) of the Robinson-Patman Act. Petition at 20-21. Portland 76 has not argued (as Unocal implies) that the case presented here is identical to the case presented in Haug.

D. Unocal Disregards the Broad Economic Impact That the Ninth Circuit's Opinion Would Have If Allowed to Stand.

Unocal ignores the fact that if the Ninth Circuit's opinion is allowed to stand, franchisors and wholesalers easily will be able to evade the Robinson-Patman Act. That clearly would undermine the goals of the Act. Unless review is granted, franchisors and wholesalers will be able to structure their economic relations with commodity resellers in a way that avoids the intent and purpose of the Robinson-Patman Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

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